Supreme Court, U.S.
FILED

10-842 DEC 23 2010

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

CLEVELAND CONSTRUCTION, INC.,
Petitioner,

v.

CITY OF CINCINNATI,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, First Appellate District of Ohio

PETITION FOR WRIT OF CERTIORARI

MARK A. VANDER LAAN, ESQ.
Counsel of Record
DONALD B. LEACH, JR., ESQ.
GREGORY P. MATHEWS, ESQ.
DINSMORE & SHOHL, LLP
191 WEST NATIONWIDE BLVD.
THIRD FLOOR
COLUMBUS, OH 43215
(614) 628-6880 (TELEPHONE)
(614) 628-6890 (FACSIMILE)
mark.vanderlaan@dinslaw.com

Counsel for Petitioner

December 23, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

It is the practice of the Supreme Court of Ohio to accept discretionary appeals on articulated "propositions of law." It is not uncommon for the Supreme Court of Ohio to grant jurisdiction to hear a case on the merits by accepting an appeal on some but not all of an appellant's propositions of law. In this case, Petitioner prevailed on due-process and equal-protection claims under 42 U.S.C. § 1983 and was awarded attorneys' fees pursuant to 42 U.S.C. § 1988. Respondent sought review by the Supreme Court of Ohio of the lower court judgments. The Supreme Court of Ohio accepted Respondent's appeal only as to its propositions of law related to Petitioner's due-process claim. After hearing the arguments of the parties regarding the due-process claim, the Supreme Court of Ohio reversed. Lower state courts subsequently held that Petitioner's equal-protection claim and substantial attorneys' fees award had been reversed by the Supreme Court of Ohio, notwithstanding that court's express refusal to consider those issues on the merits. This case thus presents the question:

> When a state court of last resort expressly declines to review a judgment based on specific federal constitutional grounds and the parties neither brief nor argue any issue related thereto, does the state court of last resort violate the Due Process Clause of the Fourteenth Amendment by depriving the prevailing party of the judgment the court expressly declined to review without first providing notice and an opportunity to be heard?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Cleveland Construction, Inc. is a privately held Nevada corporation. There is no publicly held company that owns 10% or more of Cleveland Construction, Inc.'s stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 3

CONSTITUTIONAL PROVISION 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 22

APPENDIX

Appendix A: Judgment Entry, In the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio (April 30, 2010) 1a

Appendix B: Entry Denying Plaintiff's Motion to Set a Trial Date and Entering Judgment for Defendant City of

Cincinnati, Court of Common Pleas, Hamilton County, Ohio (May 18, 2009) 6a

Appendix C: Judgment Entry, In the Supreme Court of Ohio (April 27, 2010) 8a

Appendix D: Reconsideration Entry, The Supreme Court of Ohio (August 6, 2008) 16a

Appendix E: Judgment Entry, The Supreme Court of Ohio, (May 21, 2008) 17a

Appendix F: Opinion, In the Supreme Court of Ohio (May 21, 2008) 19a

Appendix G: Entry, The Supreme Court of Ohio (December 12, 2007) 30a

Appendix H: Entry, The Supreme Court of Ohio (May 2, 2007) 31a

Appendix I: Judgment Entry, In the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio (December 8, 2006) 32a

Appendix J: Final Judgment Entry, Court of Common Pleas, Hamilton County, Ohio (August 29, 2005) 64a

Appendix K: Entry, Common Pleas Court, Hamilton County, Ohio (July 13, 2005) 70a

Appendix L: Entry Granting Defendant City of Cincinnati's Motion For Partial Directed Verdict, Denying Dismissal Of Equal Protection Claim, Withholding Judgment On Defendant Valley's 41(B)(2) Motion, and Noting Stipulation That Remaining Issues Are To Be Determined By The Court Without A Jury, Common Pleas Court, Hamilton County, Ohio (June 28, 2005) 102a

Appendix M: Entry Denying Defendants' Motions for Summary Judgment And Denying Plaintiffs Motion For Partial Summary Judgment And Injunctive Relief, Court of Common Pleas, Hamilton County, Ohio (May 13, 2005) 104a

Appendix N: Entry, The Supreme Court of Ohio (September 29, 2010) 130a

TABLE OF AUTHORITIES

CASES

Page

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 20

Brinkerhoff Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 13, 14

Grannis v. Ordean,
234 U.S. 385 (1914) 12

Hopkins v. Dyer,
104 Ohio St.3d 461, 2004-Ohio-6769 (Ohio 2004) 10

Meyer v. United Parcel Serv., Inc.,
122 Ohio St.3d 104, 2009-Ohio-2463 (Ohio 2009) 18, 19, 20

Meyer v. United Parcel Serv., Inc.,
174 Ohio App.3d 339, 2007-Ohio-7063 (Ohio App. 2007) 18

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 16

Nelson v. Adams, USA, Inc.,
529 U.S. 460 (2000) 12

Nolan v. Nolan,
11 Ohio St.3d 1 (Ohio 1984) 10, 17

Richards v. Jefferson Cnty.,
517 U.S. 793 (1996) 12, 13, 15

Sexton v. Mason,
117 Ohio St.3d 275, 2008-Ohio-858 (Ohio 2008) 18

Sheaffer v. Westfield Ins. Co.,
110 Ohio St.3d 265, 2006-Ohio-4476 (Ohio 2006) 17, 18, 20

State v. Warren,
118 Ohio St.3d 200, 2008-Ohio-2011 (Ohio 2008) 18

State ex rel. Bd. of State Teachers Ret. Sys. of Ohio v. Davis,
113 Ohio St.3d 410, 2007-Ohio-2205 (Ohio 2007) 18

State ex rel. Potain v. Mathews,
59 Ohio St.2d 29 (Ohio 1979) 17

United of Omaha Life Ins. Co. v. Solomon,
960 F.2d 31 (6th Cir. 1992) 19

CONSTITUTION

U.S. Const. amend. 14, § 1 ..... 3, 10

STATUTES

28 U.S.C. § 1257 3

42 U.S.C. § 1983 4

42 U.S.C. § 1988 4

RULE

Sup. Ct. R. 13 3

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished Judgment Entry of the Hamilton County Court of Appeals, First Appellate District, entered April 30, 2010, is reprinted in the Appendix at 1a.

The unpublished Entry Denying Plaintiff's Motion to Set a Trial Date and Entering Judgment for Defendant City of Cincinnati, entered May 18, 2009, is reprinted in the Appendix at 6a.

The unpublished Judgment Entry of the Supreme Court of Ohio, entered April 27, 2010, is reprinted in the Appendix at 8a.

The unpublished Reconsideration Entry of the Supreme Court of Ohio, entered August 6, 2008, is reprinted in the Appendix at 16a.

The unpublished Judgment Entry of the Supreme Court of Ohio, entered May 21, 2008, is reprinted in the Appendix at 17a.

The Opinion of the Supreme Court of Ohio, *Cleveland Constr., Inc. v. Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337 (Ohio 2008), is reprinted in the Appendix at 19a.

The unpublished Entry of the Supreme Court of Ohio denying Cincinnati's motion to add proposition of law, entered December 12, 2007, is reprinted in the Appendix at 30a.

The unpublished Entry of the Supreme Court of Ohio accepting jurisdiction on Propositions of Law Nos. I and III, entered May 2, 2007, is reprinted in the Appendix at 31a.

The Judgment Entry and Opinion of the Hamilton County Court of Appeals, First Appellate District, *Cleveland Constr., Inc. v. Cincinnati*, 169 Ohio App.3d 627, 2006-Ohio-6452 (Ohio App. 2006), entered Dec. 8, 2006, is reprinted in the Appendix at 32a.

The Final Judgment Entry of Hamilton County Court of Common Pleas, entered August 29, 2005, is reprinted in the Appendix at 64a.

The Entry of Hamilton County Court of Common Pleas, entered July 13, 2005, is reprinted in the Appendix at 70a.

The Entry Granting Defendant City of Cincinnati's Motion for Partial Directed Verdict, Denying Dismissal of Equal Protection Claim, Withholding Judgment on Defendant Valley's 41(B)(2) Motion, and Noting Stipulation That Remaining Issues Are To Be Determined By The Court Without A Jury, entered June 28, 2005, is reprinted in the Appendix at 102a.

The Entry Denying Defendants' Motions for Summary Judgment And Denying Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief, entered May 13, 2005, is reprinted in the Appendix at 104a.

The unpublished Entry of the Supreme Court of Ohio declining jurisdiction to hear the case, entered

September 29, 2010, is reprinted in the Appendix at 130a.

JURISDICTION

The Judgment Entry of the Court of Appeals of Ohio, First Appellate District, was entered April 30, 2010. A timely Notice of Appeal and Memorandum in Support of Jurisdiction, in which Petitioner preserved for appeal its constitutional claims, were filed in the Supreme Court of Ohio. The decision of the Supreme Court of Ohio declining jurisdiction and dismissing the appeal without a ruling on the merits was entered on September 29, 2010. App. 130a. This Petition for Writ of Certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13. The Court derives jurisdiction from 28 U.S.C. § 1257. As such, Petitioner's constitutional question has been timely and properly raised, and this Court has jurisdiction to review the judgment on a writ of certiorari.

CONSTITUTIONAL PROVISION

U.S. Const. amend. 14, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of competitive bidding for a public contract related to the expansion and renovation of the Cincinnati Convention Center. Cleveland Construction, Inc. ("CCI") sued the City of Cincinnati ("Cincinnati") and other defendants in the Hamilton County Court of Common Pleas when the city awarded the drywall contract on the project to another bidder based on the city's application of its Small Business Enterprise ("SBE") Program, which requires bidders of public contracts to use good-faith efforts to promote opportunities for minority- and women-owned businesses. CCI brought claims pursuant to 42 U.S.C. § 1983, alleging that the SBE Program was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and that Cincinnati deprived it of a protected property interest in the drywall contract without providing due process in violation of the Due Process Clause of the Fourteenth Amendment.

The trial court directed a verdict in favor of Cincinnati on CCI's claim for lost profits. App. 102a–103a. Following a bench trial, the trial court found that Cincinnati violated Section 1983 by depriving CCI of a protected property interest without affording due process and that the SBE Program violated the Equal Protection Clause of the United States Constitution. App. 64a–69a. The trial court enjoined Cincinnati from maintaining or applying race- and gender-based classifications in its SBE Program. *Id.* CCI was awarded $433,290.00 in attorneys' fees, plus costs, as the prevailing party pursuant to 42 U.S.C. § 1988. App. 67a.

CCI appealed to the Ohio Court of Appeals, First Appellate District, and Cincinnati cross-appealed. The court of appeals affirmed the judgment of the trial court with respect to its findings that CCI had a protected property interest in the drywall contract, that the SBE Program was facially unconstitutional, and that CCI was entitled to costs and attorneys' fees as the prevailing party. App. 46a, 49a–50a, 51a (*Cleveland Constr., Inc. v. Cincinnati*, 169 Ohio App.3d 627, 2006-Ohio-6452, ¶ 38, 49, 53). The court of appeals reversed the trial court's judgment directing a verdict in favor of Cincinnati on CCI's claim for lost profits under Section 1983. App. 56a (*Cleveland Constr., Inc. v. Cincinnati*, 169 Ohio App.3d 627, 2006-Ohio-6452, at ¶ 67). The court of appeals remanded the case to the trial court for a new trial on the issues of liability and damages on the lost-profits claim. *Id.* The court of appeals affirmed the judgment of the trial court in all other respects.

Cincinnati then appealed to the Supreme Court of Ohio. Cincinnati asked the Supreme Court of Ohio to exercise discretionary jurisdiction and to consider the following five propositions of law:

> Proposition of Law No. I: Under Ohio law, a disappointed bidder for a City of Cincinnati public contract does not have a constitutionally protected property interest in that contract.
>
> Proposition of Law No. II: To prove a deprivation of its right to procedural due process, a disappointed bidder with a constitutionally protected property interest in a public contract must establish that the

> government entity did not provide sufficient notice and opportunity to be heard.
>
> Proposition of Law No. III: A disappointed bidder for a public contract in Ohio cannot recover lost-profit damages in a 42 U.S.C. § 1983 action alleging deprivation of procedural due process.
>
> Proposition of Law No. IV: A plaintiff does not have standing to seek an injunction against the operation of a municipal corporation unless the plaintiff pleads and proves a concrete and imminent injury in fact.
>
> Proposition of Law No. V: A subcontracting outreach program is not impermissibly race-based or gender-based when all bidders have an equal opportunity to comply with the subcontracting outreach program and the program does not create a preference.

It is not uncommon for the Supreme Court of Ohio to accept jurisdiction of an appeal on some, but not all, propositions of law. In this case, the court accepted Cincinnati's discretionary appeal on Propositions of Law Nos. I and III only, both of which related solely to CCI's due-process claim. App. 31a (*Cleveland Constr., Inc. v. Cincinnati*, 113 Ohio St.3d 1488, 2007-Ohio-1986). After the case had been fully briefed on the two propositions of law accepted for review, Cincinnati moved for leave to add its fifth proposition of law to the pending appeal. In that motion, Cincinnati noted that the court had not accepted its appeal on the equal protection issues challenging application of strict scrutiny in determining the validity of the SBE

Program. The court denied Cincinnati's motion. App. 30a (*Cleveland Constr., Inc. v. Cincinnati*, 116 Ohio St.3d 1435, 2007-Ohio-6518).

The Supreme Court of Ohio then considered the appeal, as accepted and briefed, on the merits. App. 20a. *See Cleveland Constr., Inc. v. Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337, at ¶ 1 (noting that the "discretionary appeal was accepted on the issues of whether an unsuccessful bidder may have a constitutionally protected property interest in a public contract and whether it may assert damages for lost profits in an action alleging violation of its procedural due process rights under Section 1983, Title 42, U.S.Code"). The Supreme Court of Ohio reversed the judgment of the court of appeals, holding that Cincinnati did not violate CCI's due-process rights because CCI did not have a protected property interest in the public contract at issue. *Id.* at ¶ 17, 19 (App. 26a–27a). The court did not address the lost-profits issue because a protected property interest was a necessary component of any due-process claim. *Id.* at ¶ 18 (App. 27a). Accordingly, the court reversed the judgment of the court of appeals and entered judgment for Cincinnati. *Id.* at ¶ 19 (App. 27a). The decision did not address the equal-protection issues that had not been accepted for review.

Following the decision of the Supreme Court of Ohio, CCI filed a motion asking that court to clarify its decision, or, in the alternative, to reconsider its decision. This request was based on the fact that the court's decision stated, "The judgment of the court of appeals is therefore reversed, and judgment is entered for the city." *Id.* at ¶ 19 (App. 27a). CCI asked the court to include explicit language in its decision to

reflect the fact that it had not accepted for review—and did not consider—any issues related to CCI's equal-protection claims, which remained subject to remand based on the judgment and mandate of the court of appeals. The court denied CCI's motion, presumably finding that its decision was sufficiently clear as it related to CCI's remaining equal-protection claim. App. 16a. Consistent with this apparent finding, the judgment entry and mandate of the court contained limiting language:

> This cause, here on appeal from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, and judgment is entered for the city, *consistent with the opinion rendered herein*.

App. 17a (emphasis supplied).

Because the Supreme Court of Ohio had not accepted for review the issues on which the court of appeals reversed and remanded, CCI filed in the Hamilton County Court of Common Pleas a Motion to Set Trial Date for Issues Remanded for New Trial. Consistent with the opinion rendered by the Supreme Court of Ohio and the judgment mandate of the court of appeals, CCI sought a trial date so that the matter could proceed on CCI's claim for damages flowing from the equal-protection violation. CCI also sought to enforce the attorneys' fees award that arose from Cincinnati's equal-protection violation. The trial court denied CCI's motion, finding that the decision of the Supreme Court of Ohio required it to enter judgment for Cincinnati on all of CCI's claims. App. 6a–7a. CCI

appealed to the Ohio Court of Appeals, First Appellate District.

While the case was pending on appeal, CCI sought to disqualify Judge William L. Mallory, Jr., one of the court of appeals judges that heard the appeal. CCI asserted that Judge Mallory had a conflict of interest because his brother is the mayor of Cincinnati. The Acting Chief Justice denied the disqualification, but in doing so noted the confusing procedural history of the case:

> At the outset, I note the apparent confusion among the parties regarding what matters are at issue before Judge Mallory and the other judges on the appellate panel. Judge Mallory and the attorneys for Cleveland Construction and the City of Cincinnati disagree as to the exact issues that remain for the court of appeals to resolve. This confusion stems, no doubt, from the various rulings of the trial court, the court of appeals in the first appeal, and this court. Nevertheless, although it is not entirely clear whether Cleveland Construction's equal protection claim is still alive or was extinguished by these prior rulings, that question is not dispositive for purposes of this affidavit-of disqualification proceeding.

App. 12a.

The court of appeals affirmed, holding that the trial court lacked discretion and jurisdiction to consider CCI's remaining claims. App. 1a–5a. The court of appeals held that the mandate of the Supreme Court of Ohio effectively extinguished CCI's remaining

claims. The court of appeals reached this conclusion by erroneously applying the rule that "[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." App. 3a (quoting *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶ 1 (Ohio 2004) (quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, syllabus (Ohio 1984)).

CCI appealed to the Supreme Court of Ohio, arguing that it should accept jurisdiction over the appeal because the law-of-the-case doctrine applies to the issues of law that the Supreme Court of Ohio declined to accept for review on the merits in the prior appeal. CCI further argued that a refusal to apply the law-of-the-case doctrine would result in a violation of CCI's fundamental right to due process.[1] The Fourteenth Amendment to the United States Constitution prohibits a state from depriving any person of life, liberty, or property, without due process of law. U.S. Const. Amend. 14, § 1. CCI argued that it never was afforded an opportunity to be heard by the Supreme Court of Ohio either orally or in writing on its equal-protection claim, and therefore that court could not have reversed the judgment of the court of appeals on that claim without violating CCI's due-process rights. The Supreme Court of Ohio declined jurisdiction. This Petition followed.

---

[1] Memorandum in Support of Jurisdiction of Plaintiff-Appellant Cleveland Construction, Inc., pp. 1, 12–13.

REASONS FOR GRANTING THE WRIT

This case presents an important constitutional question with significant practical consequences that has not been, but should be, settled by this Court. Here, the Supreme Court of Ohio reviewed some, but not all, of CCI's claims on the merits. In a prior appeal by Cincinnati, the Supreme Court of Ohio expressly declined to hear or consider arguments related to the constitutionality of Cincinnati's SBE Program under the Equal Protection Clause. Yet in reversing the judgment of the lower court and then refusing to accept discretionary jurisdiction over the instant appeal, the Supreme Court of Ohio deprived CCI, without being afforded any right to be heard, of the judgments it had obtained in its favor on its equal-protection claims, including a declaratory judgment in its favor and an award of substantial attorneys' fees.

The Supreme Court of Ohio's refusal to hear CCI's appeal on the merits effectively validated the lower court's conclusions and extinguished CCI's equal-protection damages claim and attorneys' fees award and nullified the declaration that Cincinnati's SBE Program is facially unconstitutional. This was done despite the fact that CCI had no notice that its equal-protection claim and attorneys' fees award were in jeopardy during Cincinnati's appeal to the Supreme Court of Ohio. CCI had no opportunity to be heard on those issues.

What is more, the lower courts conclusively determined that the SBE Program is facially unconstitutional under the equal protection clause due to its use of race- and gender-based classifications. The Supreme Court of Ohio deliberately chose not to

review that determination. Nevertheless, as a result of the decisions below, Cincinnati is permitted to utilize a clearly unconstitutional program even though no court has found it to be constitutional.

CCI was awarded $433,290.00 in attorneys' fees more than five years ago. Since then, its right to that money has been affirmed but never reversed on the merits. The court of appeals awarded CCI the right to attempt to prove lost profits four years ago. That decision has never been reversed on the merits as to CCI's equal-protection claim. Yet CCI finds itself in a position of losing those awards based on the decisions below.

The Fourteenth Amendment to the United States Constitution guarantees that a state shall not deprive citizens of life liberty, or property without due process of law. This Court has repeatedly held that the right to due process protects the right to be heard. *See, e.g.*, *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 472 (2000) ("Nelson seeks only the right to contest on the merits his personal liability for fees originally sought and awarded solely against OCP. That right, we hold, is just what due process affords him."); *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996) ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.");*Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

Although a state court of last resort may develop its own rules for the acceptance and disposition of appeals, those rules cannot be exercised in a manner that results in the deprivation of due process. *See*

Richards, 517 U.S. at 797 (holding that though state courts "are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes * * * extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character'"). *See also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."). This case presents an important constitutional question regarding what effectively was a summary reversal of lower court judgments by the Supreme Court of Ohio. The question is whether the Supreme Court of Ohio violated CCI's right to due process when it reversed the lower court on CCI's equal-protection claim without affording CCI notice or an opportunity to be heard on those issues.

This case presents a concern similar to the one addressed in *Brinkerhoff-Faris*. In *Brinkerhoff-Faris*, the Supreme Court of Missouri denied injunctive relief against the collection of unlawful taxes because of the taxpayer's failure to pursue administrative remedies. *Id.* at 675-676. In reaching this conclusion, the Supreme Court of Missouri reversed settled law that had made clear that no such administrative remedies existed. *Id.* at 676-677. The Supreme Court of Missouri overruled its precedent even though neither party advocated for reversal and "[n]o one doubted the authority of [the settled law] until it was expressly overruled in the case at bar." *Id.* at 677.

This Court reversed the judgment of the Supreme Court of Missouri because it "denied to the plaintiff

due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* at 678. The Court explained:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. * * * But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-682.

As this Court recognized in *Brinkerhoff-Faris*, a decision of a state court may not effectively deprive a party of *any* meaningful right to be heard in relation to a protected interest. In the initial appeal here, the Supreme Court of Ohio consciously and expressly limited its review to due-process issues, thereby directing that the non-reviewed judgments related to equal-protection violations were to remain intact. This case would allow the Court to address the right to be heard in a new context, where the Supreme Court of Ohio nullified CCI's equal-protection damages claim, attorneys' fees award, and the declaration that Cincinnati's SBE Program is facially unconstitutional—all without providing notice that

those judgments were at issue and without affording CCI any opportunity to present arguments thereto. This important issue arises in the context of a state court of last resort's authority to exercise discretionary review.

The due-process implications here also are analogous to the constitutional limits on the application of the doctrine of res judicata. This Court has held "that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797. In *Richards*, the Court reversed a state court's application of the doctrine of res judicata because the "petitioners received neither notice of, nor sufficient representation in" the prior litigation. *Id.* at 805. In short, based on fundamental principles of due process, the petitioners could not be bound by prior litigation because they had not been given an opportunity to be heard.

Likewise here, the Supreme Court of Ohio's exercise of its prerogative to accept Cincinnati's appeal only on due-process issues, when coupled with the court's subsequent reversal of CCI's equal-protection claim, resulted in a violation of CCI's constitutional right to due process. The Supreme Court of Ohio expressly limited the scope of its review and directed the parties to limit their arguments to the issues accepted for review. CCI lacked notice that issues related to its equal-protection claim were subject to review by the Supreme Court of Ohio, and it was not given notice or an opportunity to be heard on those issues. This case will allow the Court to examine how the constitutional principles articulated in *Richards* relate to a decision by a state court of last resort to

review some, but not all, issues presented in a discretionary appeal.

It cannot fairly be concluded that CCI had notice or was given an opportunity to be heard when it submitted a merit brief and oral argument during the initial appeal to the Supreme Court of Ohio. This Court has held that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce of contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Supreme Court of Ohio twice refused to hear argument related to CCI's equal-protection claim. App. 30a, 31a. And in fact neither party briefed or argued the merits of CCI's equal-protection claim in the Supreme Court of Ohio. Therefore, although the Supreme Court did hear certain issues in this case on the merits, the Supreme Court of Ohio did not afford CCI an opportunity to be heard on its equal-protection claim either before or after the judgments related to those claims were reversed by that court.

Because CCI never was afforded an opportunity to be heard either orally or in writing on its equal-protection claim, the Supreme Court of Ohio violated CCI's due-process rights by reversing the judgment of the court of appeals on that claim and by refusing to hear CCI's subsequent appeal on the merits.

In requesting discretionary review by the Supreme Court of Ohio, CCI argued that Ohio law regarding the doctrine of the law of the case should have resulted in a remand to the trial court for the consideration of equal-protection issues. The Supreme Court of Ohio's May 2, 2007 and December 12, 2007 decisions not to

hear the equal-protection issue on appeal settled those issues for purposes of this litigation. The doctrine of the law of the case "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (Ohio 1984). The rule ensures consistent results in a case and avoids endless litigation by settling issues. *Id.* It also "preserve[s] the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.* (citing *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32 (Ohio 1979)). "[T]he doctrine functions to compel trial courts to follow the mandates of reviewing courts." *Id.*

Under Ohio law, the law-of-the-case doctrine applies when the Supreme Court of Ohio decides not to consider a discretionary appeal. *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, syllabus (Ohio 2006). The Supreme Court of Ohio's refusal to exercise discretionary jurisdiction "settles the issue of law appealed." *Id.* The doctrine also should apply when the Supreme Court of Ohio declines jurisdiction to hear a proposed issue of law, even when other issues in the same case are accepted for review. Thus, in this case, when the Supreme Court of Ohio denied jurisdiction to hear Cincinnati's appeal on its equal-protection proposition of law, it settled the issues of law related to that proposition and left the judgment of the court of appeals—and its mandate—undisturbed insofar as it related to CCI's equal-protection claim and the attorneys' fees award related thereto.

This conclusion is supported under Ohio law. When the Supreme Court of Ohio declines jurisdiction over

an appeal in its entirety, there is no doubt that that decision settles all issues of law appealed. *Sheaffer*, 110 Ohio St.3d 265, 2006-Ohio-4476, at syllabus; *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, ¶ 49 (Ohio 2007). And when employing the practice of accepting appeals only as to limited issues, the Supreme Court of Ohio at least implicitly has acknowledged that the practice effectively settles those issues of law not accepted for review. *See, e.g., State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, ¶ 55 (Ohio 2008) (stating that "[b]ecause we declined to review Warren's propositions of law on these issues, this argument is at least arguably beyond the scope of this appeal"); *Sexton v. Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, ¶ 17, n.1 (Ohio 2008) (indicating that the appeal involved only those claims related to the proposition of law accepted for review because the court declined to review an additional proposition of law regarding summary judgment in favor of a co-defendant, which had been granted "on grounds unrelated to those implicated in the proposition of law accepted for review").

Additionally, in *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St.3d 104, 2009-Ohio-2463 (Ohio 2009), a jury found in favor of the plaintiff-employee on two claims, one for workers' compensation retaliatory discharge and one for age discrimination. *Id.* at ¶ 6. On the defendant-employer's appeal, the court of appeals rejected the defendant-employer's argument related to the age-discrimination claim, but reversed the judgment and remanded for further proceedings based on its holding that the plaintiff was not entitled to a jury on his retaliatory-discharge claim. *Meyer v. United Parcel Serv., Inc.*, 174 Ohio App.3d 339, 2007-

Ohio-7063, at ¶ 2, 39-40, 46, 69 (Ohio App. 2007). The Supreme Court of Ohio accepted a discretionary appeal on the defendant-employer's single proposition of law related to the age-discrimination claim. *Meyer*, 122 Ohio St.3d 104, 2009-Ohio-2463, at ¶ 8. The court, however, declined jurisdiction to hear the plaintiff-employee's cross-appeal, which related solely to the jury-trial issue on the retaliatory-discharge claim. *Id.* at ¶ 8, fn. 3. Regarding the retaliatory-discharge claim, the Supreme Court of Ohio stated:

> We did not accept for review Meyer's cross-appeal, which challenged the court of appeals' holding that there should not have been a jury trial on his statutory claim of workers' compensation retaliation. As a result, the court of appeals' determination that the trial court's judgments on the jury verdicts and on additional issues must be reversed and remanded stands as conclusively established and is not within the scope of this appeal.

Id.

Similarly here, CCI asserted distinct claims for relief under Section 1983 for violations of due process and equal protection. CCI's due-process claim was based on what it believed was the city's arbitrary deprivation of a public contract without the due process of law. *See, e.g.*, *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) (holding that a disappointed bidder may establish a legitimate claim of entitlement to a public contract if the government abused its discretion in awarding the contract to another bidder). CCI's equal-protection claim was based on Cincinnati's impermissible use of

race- and gender-based classifications in awarding the public contract. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (holding that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

The Supreme Court of Ohio accepted Cincinnati's appeal under its discretionary jurisdiction on only two of Cincinnati's five propositions of law, both of which related solely to CCI's due-process claim. The court—on two separate occasions—refused to hear Cincinnati's challenge to the court of appeals' holding related to CCI's equal-protection claim. Based on the statements of the Supreme Court of Ohio in *Meyer* and based on the holding in *Sheaffer*, the decision on the merits, which related solely to due-process considerations, should not have disturbed CCI's equal-protection claim, which was subject to further proceedings in the trial court based on the December 8, 2006 judgment and mandate of the court of appeals. This is true notwithstanding the fact that the decision of the Supreme Court of Ohio did not expressly address the remaining vitality of CCI's equal-protection claim, the attorneys' fees award related thereto, or expressly remand the cause to the trial court for further proceedings on that claim.

The fact that the Supreme Court of Ohio did not expressly remand the case to the Hamilton County Court of Common Pleas for a new trial on the remaining equal-protection issues did not deprive that court of jurisdiction to consider those issues. Without addressing the significance of the Supreme Court of

Ohio's decision not to accept jurisdiction on Cincinnati's equal-protection proposition of law, the lower courts assumed that the Supreme Court of Ohio's mandate was much broader than it actually was. That assumption was wrong. The refusal to hear Cincinnati's appeal in regards to CCI's equal-protection claim conclusively settled the court of appeals' holding on that claim. Nevertheless, the substance of the Supreme Court of Ohio's decision simply did not support the conclusion that the court disposed of CCI's equal-protection claim or that it vacated the attorneys' fees award.

This case, therefore, presents a fundamental constitutional question that this Court has not yet considered, regarding the ability of a state court of last resort to reverse a judgment without affording the adversely affected party with notice or any right to be heard. The Supreme Court of Ohio may, under its own prerogative, choose to consider some but not all issues presented in a case. In doing so, however, the court cannot disregard a litigant's fundamental right to be heard on an issue before a favorable lower court judgment is reversed. This Court should grant certiorari and reverse the holding of the Court of Appeals of Ohio.

CONCLUSION

For the foregoing reasons, Petitioner Cleveland Construction, Inc. respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

Mark A. Vander Laan, Esq.
Counsel of Record
Donald B. Leach, Jr., Esq.
Gregory P. Mathews, Esq.
Dinsmore & Shohl, LLP
191 West Nationwide Blvd.
Third Floor
Columbus, OH 43215
(614) 628-6880 {Telephone}
(614) 628-6890 {Facsimile}
mark.vanderlaan@dinslaw.com

Counsel for Petitioner

Date: December 23, 2010

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A:	Judgment Entry, In the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio (April 30, 2010)	1a
Appendix B:	Entry Denying Plaintiff's Motion to Set a Trial Date and Entering Judgment for Defendant City of Cincinnati, Court of Common Pleas, Hamilton County, Ohio (May 18, 2009)	6a
Appendix C:	Judgment Entry, In the Supreme Court of Ohio (April 27, 2010)	8a
Appendix D:	Reconsideration Entry, The Supreme Court of Ohio (August 6, 2008)	16a
Appendix E:	Judgment Entry, The Supreme Court of Ohio, (May 21, 2008)	17a
Appendix F:	Opinion, In the Supreme Court of Ohio (May 21, 2008)	19a

Appendix G: Entry, The Supreme Court of Ohio (December 12, 2007) 30a

Appendix H: Entry, The Supreme Court of Ohio (May 2, 2007) 31a

Appendix I: Judgment Entry, In the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio (December 8, 2006) 32a

Appendix J: Final Judgment Entry, Court of Common Pleas, Hamilton County, Ohio (August 29, 2005) 64a

Appendix K: Entry, Common Pleas Court, Hamilton County, Ohio (July 13, 2005) 70a

Appendix L: Entry Granting Defendant City of Cincinnati's Motion For Partial Directed Verdict, Denying Dismissal Of Equal Protection Claim, Withholding Judgment On Defendant Valley's 41(B)(2) Motion, and Noting Stipulation That Remaining Issues Are To Be Determined By The Court Without A Jury, Common Pleas Court, Hamilton County, Ohio (June 28, 2005) 102a

Appendix M: Entry Denying Defendants' Motions for Summary Judgment And Denying Plaintiff's Motion For Partial Summary Judgment And Injunctive Relief, Court of Common Pleas, Hamilton County, Ohio (May 13, 2005) 104a

Appendix N: Entry, The Supreme Court of Ohio (September 29, 2010) 130a

APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-090419
TRIAL NO. A-0402638

[Filed April 30, 2010]

CLEVELAND CONSTRUCTION, INC.,

Plaintiff-Appellant,

vs.

CITY OF CINCINNATI,

Defendant-Appellee,

and

TIMOTHY RIORDEN, ET AL.,

Defendants.

JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

This case arose from defendant-appellee city of Cincinnati's rejection of a bid by plaintiff-appellant Cleveland Construction, Inc., for drywall work on the expansion and renovation of the Cincinnati Convention Center. Cleveland Construction sued the city for lost profits and sought an injunction when it was not awarded a contract. The trial court denied injunctive relief and granted a directed verdict for the city as to lost profits, but held that the contractor was deprived of its property interest in the contract without due process. This court affirmed as to the property-interest determination but reversed the directed-verdict determination.[2]

The city appealed. The Ohio Supreme Court accepted the case and held that, since Cleveland Construction had never been awarded the contract and then deprived of it, it could have had a property interest only if the city had no discretion to reject its bid, or if the city had so little discretion that not awarding the contract would have been an abuse of discretion. The court concluded that, given the city's extensive discretion in considering bids, Cleveland Construction had no property right in the contract at

---

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

[2] *Cleveland Constr., Inc. v. Cincinnati*, 169 Ohio App.3d 627, 2006-Ohio-6452, 864 N.E.2d 116.

issue. The court concluded its opinion by stating that the "judgment of the court of appeals is therefore reversed, and judgment is entered for the city."

Cleveland Construction filed a motion for either clarification or reconsideration of that decision. It noted that the decision appeared to enter judgment in favor of the city as to all of its claims. Cleveland Construction argued that the supreme court "[ha]d not accept[ed] jurisdiction over the portion of the First District's Judgment relating to Plaintiff's claims for Equal Protection violations, which the First District remanded for a new trial on issues of liability and damages under 42 U.S.C. § 1983." The motion to clarify or reconsider was denied.

After the case returned to the trial court, Cleveland Construction filed a request to set the equal-protection claim for trial. The trial court denied that request and entered judgment for the city.

In one assignment of error, Cleveland Construction now claims that the trial court "erred by refusing to follow this court's mandate to retry the Equal Protection damage claim and by entering judgment in favor of the city on that claim." We disagree. "[A]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case."[3] A trial court

---

[3] *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, at ¶1, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410, syllabus.

exceeds its jurisdiction by proceeding contrary to the mandate of the superior court.[4]

The Ohio Supreme Court's mandate, as spelled out in its judgment, could not be clearer: "the judgment of the court of appeals is reversed, and judgment is entered for the city, consistent with the opinion rendered herein. It is further ordered that * * * a mandate be sent to the Court of Common Pleas for Hamilton County to carry this judgment into execution * * *." The supreme court did not limit or qualify its reversal of our decision. It did not enter judgment for the city on only some claims–it entered judgment for the city. The court was given the opportunity to clarify or revise its mandate, and it did not. The trial court's entry of judgment was ministerial and mandatory, and it was the only action the court had the jurisdiction to undertake. Our jurisdiction is no broader.

We overrule Cleveland Construction's sole assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER AND MALLORY, JJ.

---

[4] *O'Donnell Constr. Co. v. Mannen*, 8th Dist. No. 88717, 2006-Ohio-6601, at ¶9, citing *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 1995-Ohio-98, 652 N.E.2d 742, and *State ex rel. TRW, Inc. v. Jaffe* (1992), 78 Ohio App.3d 411, 604 N.E.2d 1376.

To the Clerk:

Enter upon the Journal of the Court on April 30, 2010 per order of the Court.

/s/ Penelope R. Cunningham
Presiding Judge

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE No. A0402638
JUDGE JEROME METZ

[Filed May 18, 2009]

Cleveland Construction, PLAINTIFF	)
-vs-	)
City of Cincinnati, et al., DEFENDANTS.	)

ENTRY DENYING PLAINTIFF'S MOTION TO SET A TRIAL DATE AND ENTERING JUDGMENT FOR DEFENDANT CITY OF CINCINNATI

As expressed on the record of May 12, 2009, Plaintiff Cleveland Construction, Inc.'s Motion to Set Trial Date for Issues Remanded for New Trial is denied. Consistent with the Ohio Supreme Court's decision, judgment is hereby entered for the Defendant City of Cincinnati.

SO ORDERED.

/s/ Jerome J. Metz, Jr.
Judge

APPENDIX C

IN THE SUPREME COURT OF OHIO

Supreme Court Case No. 10-AP-012

[Filed April 27, 2010]

CLEVELAND CONSTRUCTION, INC.,	)
	)
Appellant,	)
	)
vs.	)
	)
CITY OF CINCINNATI,	)
	)
Appellee.	)
	)

From the Hamilton County
Court of Appeals
Court of Appeals Case No. C-0900419

Judgment Entry

W. Kelly Lundrigan, counsel for appellant Cleveland Construction, has filed an affidavit with the Clerk of this Court under R.C. 2501.13 seeking the disqualification of Judge William L. Mallory, Jr. from acting on any further proceedings in Case No. C-0900419 in the Hamilton County Court of Appeals

Lundrigan alleges that Judge Mallory has a conflict of interest in the underlying appeal because the judge's brother is Mark Mallory, the mayor of Cincinnati. Lundrigan states that the subject of the appellate case is Cincinnati's Small Business Enterprise ("SBE") Program, and more specifically rules and guidelines that require bidders of public contracts to use good faith efforts to promote opportunities for minority- and women-owned businesses. Lundrigan notes that the trial court issued a permanent injunction that prohibits the city from implementing the race- and gender-based classifications in its SBE rules, and he asserts that the issue before the appellate court is whether any of the race-conscious provisions of the SBE Program remain subject to the injunction. According to Lundrigan, Mayor Mallory is directly involved in the issue before the court of appeals because the mayor has been under political pressure to increase participation of minority- and women-owned businesses in contracts awarded under the city's SBE Program. He alleges that Judge Mallory cannot be impartial and unbiased in deciding this case because the judge's brother is directly involved in the SBE Program and its implementation, including the very issues that are at stake in this case.

Judge Mallory has responded in writing to the concerns raised in the affidavit of disqualification. The judge notes that it is his practice to recuse himself from cases where his brother is (1) named individually or in his capacity as mayor, or (2) involved as a policymaker or as a witness. The judge states that when he reviewed the briefs and record of the case, he found no indication of a conflict of interest. Judge Mallory also notes that the two other judges on the panel raised no concerns about a conflict. According to

the judge, the controversy between the City of Cincinnati and Cleveland Construction pertains to the expansion of the Cincinnati Convention Center and, moreover, his brother was not mayor at the time of the expansion or when Cleveland Construction submitted bids that resulted in the filing of their lawsuit.

The City of Cincinnati has also responded to the affidavit of disqualification. The city disputes Lundrigan's claim that the appeal concerns injunctive relief. Rather, the city maintains that the basis for appeal is the trial court's denial of Cleveland Construction's motion for new trial for damages stemming from Cleveland's alleged equal protection violation under 42 U.S.C. Section 1983. The city alleges that Cleveland Construction is trying to create an equal protection damages claim that does not exist. The city takes no position on the issue of Judge Mallory's requested disqualification.

Procedural History

The underlying appellate case arises out of the expansion of the Cincinnati Convention Center, a large-scale public project with an estimated budget of $145 million. Cleveland Construction filed suit when the drywall contract on the project was awarded to another bidder, alleging that the SBE Program was unconstitutional and in violation of Section 1983, Title 42, U.S. Code. The trial court initially directed a verdict in favor of the city and the successful bidder on Cleveland Construction's claim for lost profits. Following a bench trial, the trial court also determined that (1) the city had deprived Cleveland Construction of a protected property interest in the drywall contract without providing due process, and (2) the SBE

Program, which required bidders to use good-faith efforts to promote opportunities for minority- and women-owned businesses, violated the Equal Protection Clause of the United States Constitution by creating impermissible race- and gender-based classifications. The trial court also enjoined the city from maintaining or applying race- and gender-based classifications in its SBE Program. While no damages were awarded due to the directed verdict, Cleveland Construction was awarded attorney fees and costs as the prevailing party.

Cleveland Construction filed an appeal and the city cross-appealed. The First District Court of Appeals reversed the trial court's directed verdict on Cleveland Construction's lost-profit claim under Section 1983, and remanded for a new trial on the issues of liability and damages. The court of appeals affirmed the trial court's judgment in all other respects. See *Cleveland Construction, Inc. v. City of Cincinnati,* 169 Ohio App.3d 627, 2006-Ohio-6452, 864 N.E.2d 116.

This court subsequently accepted the city's discretionary appeal, but only on two issues relating to the alleged violation of due process under Section 1983. On May 21, 2008, we reversed the judgment of the court of appeals, holding that the city did not violate Cleveland Construction's due-process rights because Cleveland had no protected property interest in the drywall contract. Because a property interest is a necessary prerequisite to maintaining a Section 1983 action for deprivation of due process, we declined to address whether a disappointed bidder can recover lost profits in a Section 1983 action. *Cleveland Construction, Inc. v. City of Cincinnati,* 118 Ohio St.3d 283, 2008-Ohio-2337, 888 N.E.2d 1068.

Following our decision, Cleveland Construction filed a "Motion to Set Trial Date for Issues Remanded for New Trial." Cleveland Construction's motion is premised on its belief that there remains a viable damages claim stemming from the trial court's finding that the race- and gender-based classifications in the city's SBE Program violated equal protection. In its motion for new trial, Cleveland Construction noted that this court declined to accept jurisdiction over the lower court's decisions in Cleveland Construction's favor on its equal protection claims, deciding to address only the issues that related to due process. The trial court, however, denied Cleveland Construction's new trial motion. This affidavit proceeding concerns whether Judge Mallory may hear the appeal of that decision.

The Merits of the Affidavit

At the outset, I note the apparent confusion among the parties regarding what matters are at issue before Judge Mallory and the other judges on the appellate panel. Judge Mallory and the attorneys for Cleveland Construction and the City of Cincinnati disagree as to the exact issues that remain for the court of appeals to resolve. This confusion stems, no doubt, from the various rulings of the trial court, the court of appeals in the first appeal, and this court. Nevertheless, although it is not entirely clear whether Cleveland Construction's equal protection claim is still alive or was extinguished by these prior rulings, that question is not dispositive for purposes of this affidavit-of-disqualification proceeding.

From my review of the record before me, it appears that the issue currently on appeal is whether

Cleveland Construction is entitled to a damages trial based upon a violation of its federal equal protection rights. After careful review of the affidavit and the judge's response as they relate to the issue on appeal, I conclude that attorney Lundrigan has failed to meet his burden of proving that a bias, prejudice, or other disqualifying interest that requires the judge's removal exists in this case.

Rule 2.11(A)(2)(c) of the Code of Judicial Conduct provides that a judge shall disqualify himself or herself in any proceeding in which the "judge *knows* that * * * a person within the *third degree of relationship* * * * [h]as more than a *de minimis* interest that could be substantially affected by the proceeding." (Emphasis sic.) Lundrigan, however, has not demonstrated clearly that the judge's brother has an interest that could be *substantially* affected by the proceeding. Although there have been cases in which the participation of a judge in a case that directly or indirectly involves the interest of another public official has mandated the disqualification of that judge, see e.g. *In re Disqualification of Corrigan,* 110 Ohio St.3d 1217, 2005-Ohio-7153, 850 N.E.2d 720, the record does not support such a finding in this case. Even if Cleveland Construction's success or failure on its motion for a damages trial on its equal-protection claim implicates the very aspects of the SBE Program that the mayor has been promoting, what has not been shown is whether the mayor faces any direct or indirect benefit or loss from the outcome of Cleveland Construction's appeal.

Moreover, Judge Mallory has denied the existence of a conflict of interest involving his brother in this appeal, and the other judges on the appellate panel are

apparently in agreement with the judge on this issue. "And though a judge's subjective belief as to his or her own impartiality is generally not the decisive factor in deciding a disqualification request, the judge's own assessment is certainly entitled to some weight." *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 11.

I also reject attorney Lundrigan's argument that Mayor Mallory, "as the 'official head and representative of the city for all purposes' is an 'officer, director, general partner, managing member, or trustee of a party' for purposes of the Code of Judicial Conduct, Rule 2.11(A)(2)(a).'" I do not read Rule 2.11(A)(2)(a) as requiring the disqualification of Judge Mallory solely because his brother is the duly elected mayor of a large city. The disqualification of Judge Mallory based on this rule would require the judge's disqualification from any case involving the City of Cincinnati as long as his brother is mayor, even if no interest or conflict is shown. Such a result would be impractical and unjustified.

"A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. Nothing in the affidavit or in Judge Mallory's response suggests to me that the "presumption of impartiality that is accorded all judges," *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7, has been overcome in this case.

For the reasons stated above, the affidavit of disqualification is denied. The case may proceed before Judge Mallory.

Dated this 21st day of April, 2010.

/s/ Paul E. Pfeifer
PAUL E. PFEIFER
Acting Chief Justice

Copies to:
Kristina D. Frost, Clerk of the Supreme Court
Hon. William L. Mallory, Jr.
Hamilton County Clerk of Courts
W. Kelly Lundrigan, counsel for appellant
Richard Ganulin, counsel for appellee

APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 2010-0114

[Filed August 6, 2008]

Cleveland Construction, Inc.	)
	)
v.	)
	)
City of Cincinnati and Timothy Riorden Bernadine Franklin, Nate Mullaney, Alicia Townsend, Kathi Ranford, and Valley Interior Systems, Inc.	)

Hamilton County
A0402638

RECONSIDERATION ENTRY

It is ordered by the Court that appellee's motion for reconsideration and motion to clarify court/decision in this case are denied.

(Hamilton County Court of Appeals; Nos. C050749, C050779, and C050888)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX E

THE SUPREME COURT OF OHIO

Case No. 2007-0114

[Filed May 21, 2008]

Cleveland Construction, Inc.,	)
	)
v.	)
	)
City of Cincinnati, and Timothy Riordan, Bernadine Franklin, Nate Mullaney, Alicia Townsend, Kathi Ranford, and Valley Interior Systems, Inc.	)

APPEAL FROM THE COURT OF APPEALS
A0402638

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, and judgment is entered for the city, consistent with the opinion rendered herein.

It is further ordered that costs are assessed pursuant to S.Ct.Prac.R XI(5) and that a mandate be sent to the Court of Common Pleas for Hamilton

County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

(Hamilton County Court of Appeals; Nos. C050749, C050779, and C050888)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I CERTIFY that this document is a true and accurate copy of the judgment entry of the Supreme Court of Ohio filed on May 21, 2008 in Case No. 2007-0114 and constitutes the mandate of the Court under S. Ct. Prac. R. XI, section 4.

In witness, I have subscribed my name and affixed the seal of the Supreme Court of Ohio on this 6th day of August, 2008.

Clerk of Court
by /s/ Kim Radcliffe, Deputy Clerk

APPENDIX F

THE SUPREME COURT OF OHIO

No. 2007-0114

[Filed May 21, 2008]

CLEVELAND CONSTRUCTION, INC., APPELLEE,	)
v.	)
CITY OF CINCINNATI, APPELLANT, ET AL.	)

Public contracts – Bidding – Unsuccessful bidder has no constitutionally protected property interest in public contract – City properly exercised its discretion in not awarding contract to bidder who failed to comply with requirements of invitation to bid.

(No. 2007-0114 — Submitted January 9, 2008 — Decided May 21, 2008.)

APPEAL from the Court of Appeals for Hamilton County, Nos. C-050749, C-050779, and C-050888, 2006-Ohio-6452.

SYLLABUS OF THE COURT

No property interest is created when a city properly exercises its discretion and does not award a contract to a party deemed not to have complied with the requirements of the invitation to bid.

LANZINGER, J.

{¶ 1} This discretionary appeal was accepted on the issues of whether an unsuccessful bidder may have a constitutionally protected property interest in a public contract and whether it may assert damages for lost profits in an action alleging violation of its procedural due process rights under Section 1983, Title 42, U.S.Code. We hold that because appellant, city of Cincinnati, did not abuse its discretion in failing to award the drywall contract to appellee, Cleveland Construction, Inc., no property interest in the contract ever existed; without a property interest, there is no due process violation.

I. Background

{¶ 2} This case arises out of the expansion of the Cincinnati Convention Center in the early 1990s, a large-scale public project with an estimated budget of $145 million. As part of the planning for the expansion project, the city had planned to set aside 30 percent of the overall work for small business enterprises ("SBEs"). To achieve this goal, the city reserved a varying percentage of work for SBEs in each of the 35 contracts ultimately awarded for the project. All

contract bidders for the project were apprised of this requirement in the documents accompanying the formal invitation to bid. The percentage for the contract to install drywall that was reserved for SBEs was 35 percent. The documents stated that failure to satisfy the 35 percent requirement could result in rejection of a bid.

{¶ 3} The drywall contract for the project was bid twice. None of the bids submitted in the initial round of bidding fulfilled the SBE requirement, and as a result, all bids were rejected by the city. A second round of bidding was held, and three bids were submitted. Two of those bids, submitted by Valley Interior Systems, Inc. ("Valley") and Kite, Inc., provided that at least 35 percent of the work would be performed by SBEs. Cleveland Construction failed to meet the 35 percent requirement, but did submit the lowest bid. The city ultimately awarded the contract to Valley, the lowest bidder who also satisfied the SBE requirement.

{¶ 4} Arguing that as the low bidder it had a protected property interest in the drywall contract, Cleveland Construction filed suit seeking damages for lost profits and injunctive relief to prevent Valley from proceeding on the drywall contract for the project. The trial court denied the injunctive relief, but later held that Cleveland Construction had a constitutionally protected interest in the drywall contract and that the city had deprived it of that interest without providing due process of law. The trial court awarded Cleveland Construction attorney fees and costs, but granted a directed verdict in favor of the city on Cleveland Construction's claim for lost profits.

{¶ 5} Cleveland Construction appealed, and the city filed a cross-appeal. The First District Court of Appeals affirmed the trial court's judgment finding a protected property interest and awarding attorney fees, but reversed the lower court's directed verdict and remanded the case for trial on damages. We accepted the city's discretionary appeal.

II. Legal Analysis

{¶ 6} Because Cleveland Construction alleges a violation of procedural due process under Section 1983, Title 42, U.S.Code, we must consider federal rather than state law in this case. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose* (1990), 496 U.S. 356, 375, 110 S.Ct. 2430, 110 L.Ed.2d 332. Cleveland Construction must first establish that it had a constitutionally protected property interest before it may claim a violation of procedural due process rights. *Bd. of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 569-570, 92 S.Ct. 2701, 33 L.Ed.2d 548. Although the company alleges that it had such an interest in the drywall contract, it is well settled that a constitutionally protected property interest exists only when a claimant has "more than an abstract need or desire for it. [The claimant] must have more than a unilateral expectation of it. [The claimant] must, instead, have a legitimate claim of entitlement to it." Id. at 577, 92 S.Ct. 2701, 33 L.Ed.2d 548. Furthermore, not all benefits rise to the level of entitlements; a "benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock, Colorado v. Gonzales* (2005), 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658.

{¶ 7} The Sixth Circuit Court of Appeals has held that a property interest in a public contract is created in two situations: one, when a bidder is actually awarded a contract and then deprived of it; and two, when a governmental entity has limited discretion in awarding the contract yet abuses that discretion. *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 34. Because Cleveland Construction was never actually awarded the contract and then deprived of it, the company has a property interest only if the city had no discretion to reject Cleveland Construction's bid or the city had such limited discretion that failing to award the contract to Cleveland Construction amounted to an abuse of discretion.

{¶ 8} To determine whether the city had the discretion to deny Cleveland Construction the drywall contract, we must look both to the city's municipal ordinances and the language of the relevant bid documents. In awarding contracts, the city retains broad discretion to accept and reject bids generally. Cincinnati Municipal Code 321-43 states that "[t]he City purchasing agent, City manager, or any other duly authorized contracting officer *may reject any bid for any reason or all bids for no reason* if acceptance of the lowest and best bid is not in the best interests of the City." (Emphasis added.)

{¶ 9} In this case, the city's bid package, which contained the invitation to bid and the bidding requirements, similarly reserved the right of the city to "reject any and all bids or parts of any bid * * * and not award a contract" and to "consider all elements entering into the question of determining the responsibility of the bidder." The documents also

stated that "[a]ny bid which is incomplete * * * or which contains * * * irregularities of any kind, may be cause for rejection of [the] bid." The invitation to bid also informed potential bidders that they "will be subject to the provisions of the City of Cincinnati * * * Small Business Enterprise Program. Failure of a bidder to comply with these requirements may be cause for rejection of the bid."

{¶ 10} Clearly, the Cincinnati Municipal Code and the bidding documents are united in emphasizing the city's broad discretion to grant or deny contracts. In fact, the city is not required to award a contract at all if it is dissatisfied with any of the submitted bids.

{¶ 11} In bidding the drywall contract, the city exercised its considerable discretion to reject the entire first round of bids because none of the bids conformed to the SBE requirements. Cleveland Construction's bid was among those rejected, and the company did not challenge the city's decision.

{¶ 12} The First District Court of Appeals held, however, that the broad discretion granted to the city in awarding the drywall contract was not unlimited and that the city had abused its discretion in denying Cleveland Construction the contract. In so holding, the court relied upon Cincinnati Municipal Code 321-37(c)(4). That section states that "[i]n the event that the selection of the lowest and best bidder is based primarily upon [SBE requirements], the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."

{¶ 13} Both the First District and Cleveland Construction interpret this section to mean that when the SBE requirements are the deciding factor in awarding a contract, a qualified bid may still be rejected if it exceeds the next lowest qualified bid by ten percent or $50,000, whichever is lower.

{¶ 14} The First District's interpretation is only one possible interpretation of this section, however. The other, advanced by the city, is that Cincinnati Municipal Code 321-37(c)(4) is merely a limitation that the city may impose upon a contract at its discretion ("the contract award may be made subject to" a cap). The cap is not required, according to the city, and it may impose the cap or not, relying only on its own judgment. To support its argument, the city cites Cincinnati Municipal Code 321-1-M, which provides that "may" is always used as a permissive term. Thus, when Section 321-37(c)(4) of the code states that an award *may* be limited by a cap, the city contends, the cap must be viewed as discretionary and not mandatory. Additionally, the city code provides that bids may be rejected for any reason or for no reason. Cincinnati Municipal Code 321-43. The city argues that the First District's conclusion ignores both of the above sections and thwarts what is clearly a theme in the code and in the bidding documents: that the city may take into account any number of factors in considering bids and is in no event required to award a contract to any particular bidder.

{¶ 15} Nevertheless, it is unnecessary for us to resolve the question of which interpretation is correct in order to determine whether Cleveland Construction had a property interest in the drywall contract. Even if we were to accept the First District's conclusion that

Cincinnati Municipal Code 321-37(c)(4) limits the city's discretion to award a contract to a higher bidder when the award is made based upon SBE considerations, that conclusion does not mean that the city must award the contract to the lowest bidder, which in this case is Cleveland Construction. Simply because the city might be prohibited from accepting a specific bid does not mean that it loses its discretion to reject other bids for any reason. Even if the city had abused its discretion by awarding the drywall contract to Valley, it does not follow that it also abused its discretion by denying the contract to Cleveland Construction.

{¶ 16} The outcome of this case would be different if the contract and relevant municipal ordinances said that the contract would be awarded to the "lowest bidder." Instead, they said that the contract would be awarded to the "lowest *and best* bidder." (Emphasis added.) Cincinnati Municipal Code 321-37(a). And even the lowest and best bid may be rejected if the bid "is not in the best interests of the city." Cincinnati Municipal Code 321-43.

{¶ 17} Given the extensive discretion of the city in considering bids, Cleveland Construction had no property right in the drywall contract at issue in this case. No property interest is created when a city properly exercises its discretion and does not award a contract to a party deemed not to have complied with the requirements of the invitation to bid. Because the city did not abuse its discretion, no property interest in the contract ever existed.

III. Conclusion

{¶ 18} Because we hold that Cleveland Construction did not have a property interest in the drywall contract, it is unnecessary for us to address the remaining proposition of law regarding whether a disappointed bidder can recover lost profits in an action under Section 1983, Title 42, U.S.Code. A property interest is a necessary prerequisite to maintaining a Section 1983 action for deprivation of procedural due process. *Roth*, 408 U.S. at 569-570, 92 S.Ct. 2701, 33 L.Ed.2d 548.

{¶ 19} The judgment of the court of appeals is therefore reversed, and judgment is entered for the city.

Judgment reversed.

MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and CUPP, JJ., concur.

PFEIFER, J., dissents and would affirm the judgment of the court of appeals.

LUNDBERG STRATTON, J., concurring.

{¶ 20} I agree that Cleveland Construction, Inc. did not have a property interest in the drywall contract awarded by the city of Cincinnati. I write to emphasize that I reach that conclusion on the narrow facts of this case. State law mandates only that public contracts of this magnitude be awarded to the "lowest and best bidder." R.C. 735.05. The Cincinnati

Municipal Code also requires the city to select the "lowest and best bidder," but provides the city with broad discretion to "reject any bid for any reason." Cincinnati Municipal Code 321-37 and 321-43. In addition, the city's bid package gave the city broad discretion to reject a bid. Based upon these explicit factors in this case, I must concur with the majority. However, in cases involving other cities and under other circumstances, the outcome may be different.

{¶ 21} The Cincinnati City Council, in accordance with the city code, established the process for awarding city contracts, and the city of Cincinnati afforded broad discretion to determine the "lowest and best bidder" for the city. "Generally, courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the 'lowest and best bidder.' " *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 21, 552 N.E.2d 202. However, such broad discretion without real parameters also may give rise to opportunities for abuse, unfairness, or partiality in the bidding process. Yet a bidder in such a case faces insurmountable obstacles in challenging the bid because the discretion is so broad. Nevertheless, efforts to improve the city's bidding procedures must be directed toward the city's governing body or to the General Assembly to establish stricter requirements in the bidding process under R.C. 735.05. Therefore, I reluctantly concur.

Statman, Harris & Eyrich, L.L.C., W. Kelly Lundrigan, and Elizabeth L. Hutton, for appellee.

Julia L. McNeil, Cincinnati City Solicitor, and Richard Ganulin and Mary Frances Clark, Assistant City Solicitors, for appellant.

Stephen L. Byron, Adam J. Rosplock, and John Gotherman, urging reversal for amicus curiae Ohio Municipal League.

Thomas R. Winters, First Assistant Attorney General, William P. Marshall, Solicitor General, and Susan M. Sullivan and Ara G. Mekhjian, Assistant Solicitors, urging reversal for amicus curiae state of Ohio.

Michael R. Gareau & Associates Co., L.P.A., and David M. Gareau, urging affirmance for amicus curiae Pacific Legal Foundation.

Ross, Brittain & Schonburg Co., L.P.A., and Alan G. Ross, urging affirmance for amicus curiae Northern Ohio Chapter of Associated Builders and Contractors.

APPENDIX G

THE SUPREME COURT OF OHIO

Case No. 2007-0114

[Filed December 12, 2007]

Cleveland Construction, Inc.	)
	)
v.	)
	)
City of Cincinnati, and Timothy Riorden, Bernadine Franklin, Nate Mullaney, Alicia Townsend, Kathi Ranford, and Valley Interior Systems, Inc.	)

This cause is pending before the Court as an appeal from the Court of Appeals for Hamilton County. Upon consideration of appellant's motion for leave to add proposition of law to pending appeal and memorandum in support,

It is ordered by the Court that the motion is denied.

(Hamilton County Court of Appeals; Nos. C050749, C050779, and C050888)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX H

THE SUPREME COURT OF OHIO

Case No. 2007-0114

[Filed May 2, 2007]

Cleveland Construction, Inc.	)
	)
v.	)
	)
City of Cincinnati, and Timothy Riorden, Bernadine Franklin, Nate Mullaney, Alicia Townsend, Kathi Ranford, and Valley Interior Systems, Inc.	)

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal on Propositions of Law Nos. I and III. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Hamilton County Court of Appeals; Nos. C050749, C050779, and C050888)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX I

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-050749, C-050779, C-050888
TRIAL NO. A-0402638

[Filed December 8, 2006]

CLEVELAND CONSTRUCTION, INC.,

Plaintiff-Appellant/
Cross-Appellee,

vs.

CITY OF CINCINNATI,

Defendant-Appellee/
Cross-Appellant,

and

TIMOTHY RIORDAN,

BERNADINE FRANKLIN,

NATE MULLANEY,

ALICIA TOWNSEND,

KATHI RANFORD,

and

VALLEY INTERIOR SYSTEMS, INC.,

Defendants-Appellees.

JUDGMENT ENTRY.

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 8, 2006 per Order of the Court.

By: /s/ Hildebrandt
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-050749, C-050779, C-050888
TRIAL NO. A-0402638

[Filed December 8, 2006]

CLEVELAND CONSTRUCTION, INC.,	)
	)
Plaintiff-Appellant/ Cross-Appellee,	)
	)
vs.	)
	)
CITY OF CINCINNATI,	)
	)
Defendant-Appellee/ Cross-Appellant,	)
	)
and	)
	)
TIMOTHY RIORDAN,	)
	)
BERNADINE FRANKLIN,	)
	)
NATE MULLANEY,	)
	)
ALICIA TOWNSEND,	)
	)
KATHI RANFORD,	)
	)
and	)

VALLEY INTERIOR SYSTEMS, INC.,)
)
Defendants-Appellees.)
)

Civil Appeals From: Hamilton County Court of Common Pleas.

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded.

Date of Judgment Entry on Appeal: December 8, 2006

W. Kelly Lundrigan, *Gary E. Powell*, *Robert E. Manley*, and *Manley Burke LPA*, for Plaintiff-Appellant/Cross-Appellee,

Julia L. McNeil, City Solicitor, and *Julie F. Bissinger*, Assistant City Solicitor, for Defendant-Appellee/Cross-Appellant City of Cincinnati and Defendants-Appellees Timothy Riordan, Bernadine Franklin, Nate Mullaney, Alicia Townsend, and Kathy Ranford,

David L. Barth, *Kelly A. Armstrong*, and *Cors & Bassett, LLC*, for Defendant-Appellee Valley Interior Systems, Inc.

OPINION

SYLVIA SIEVE HENDON, Judge.

{¶1} This case arose from the city of Cincinnati's rejection of a bid by Cleveland Construction Co. for drywall work on the expansion and renovation of the Cincinnati Convention Center. At the heart of the

dispute was the city's implementation of its small business enterprise (SBE) program.

{¶2} Cincinnati Municipal Code (CMC) 321-37 required the city to award a construction contract to the lowest and best bidder. The ordinance set forth a non-exhaustive list of factors that the city purchasing agent could consider in determining the lowest and best bid. One of the factors that could be considered was a contractor's compliance with the rules and regulations of the city's SBE Subcontracting Outreach Program.[1]

{¶3} Where a lowest-and-best determination was based primarily on the contractor's subcontracting-outreach compliance, the ordinance had a built-in cap. The contract award could be made, "subject to the following limitation: the bid could not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."[2] The cap was apparently intended to strike a balance between the city's efforts to include small businesses in public contracts and the city's interest in protecting its taxpayers from excessive costs.

{¶4} On December 23, 2003, the city issued an invitation to bid on the Cincinnati Convention Center Expansion and Renovation Project, entitled "Bid Package C/TC-09A Drywall." The city required bidders to show that they had made a good-faith effort to obtain the participation of SBEs on the project. For the

---

[1] CMC 321-37(c)(4).

[2] CMC 321-37(c).

drywall-contract bids, the city established a mandatory SBE-participation goal of 35%. Bidders were notified that their failure to meet the SBE-participation goal could cause a bid to be rejected as nonresponsive. The city received bids until February 5, 2004.

{¶5} On February 11, 2004, Kathi Ranford, a contract-compliance officer, reported to Bernadine Franklin, the city's purchasing agent, that none of the three bidders for the project's drywall contract had complied with the 35% SBE-participation requirement. According to Ranford, Cleveland had submitted a bid with 3% SBE participation, Valley Interior Systems had submitted a bid with 34% SBE participation, and Kite, Inc., had submitted a bid with no SBE participation. In that round of bidding, Cleveland's bid had been the lowest-dollar bid.

{¶6} Because none of the bidders had achieved the full 35% SBE-participation goal, the city conducted an emergency rebidding for the drywall contract. On February 24, 2004, Ranford notified Franklin that Cleveland had submitted a re-bid for $8,889,000, with 10% SBE participation, and that Valley had submitted a re-bid for $10,135,022, with 40% SBE participation.

{¶7} The city's office of contract compliance deemed Cleveland's bid to be unacceptable due to its failure to achieve 35% SBE participation. In all other respects, however, Cleveland's bid had been found acceptable according to the city's purchasing division.

{¶8} Following a review of the acceptability of the bids, Franklin issued a recommendation to Timothy Riordan, an assistant city manager, that the drywall contract be awarded to Valley. Franklin's

recommendation stated, "Pursuant to Section 321-37 of the Municipal Code, the bid submitted by [Valley] has been determined to be the lowest and best bid."

{¶9} Valley's new bid exceeded Cleveland's new bid by $1,246,022, well over the $50,000 or 10% cap in CMC 321-37. Nonetheless, on March 3, 2004, the city awarded the drywall contract to Valley and instructed Valley to commence work under the terms of the contract.

Cleveland Files Suit

{¶10} Three weeks later, on March 30, 2004, Cleveland brought an action for injunctive relief and damages against the city, several city employees, and Valley. Cleveland asked the court to restrain the city and Valley from proceeding on the drywall contract and to order the city to award the contract to Cleveland.

{¶11} In addition, Cleveland sought declarations by the court that (1) the city's award of the contract violated CMC 321-37; (2) the city's drywall contract with Valley was void; (3) the city's SBE program was unconstitutional and in violation of Section 1983, Title 42, U.S.Code; (4) the city had deprived Cleveland of a property interest; (5) Cleveland was the lowest and best bidder; and (6) the city's delegation of discretion to its purchasing agent under the SBE subcontracting-outreach program was void.

{¶12} Finally, Cleveland sought compensatory and punitive damages, as well as attorney fees and costs.

{¶13} The trial court denied Cleveland's motion for a temporary restraining order. Later, upon motion, the trial court dismissed the city employees from the action.

{¶14} In June 2005, the case proceeded to a jury trial. At the close of Cleveland's case, the trial court directed a verdict in favor of the city and Valley on Cleveland's claims for lost profits. Cleveland's remaining claims for injunctive and declaratory relief and attorney fees were tried to the bench, by agreement of the parties.

{¶15} At the conclusion of the trial, the court found that the city had violated CMC 321-37 by awarding the drywall contract to Valley rather than to Cleveland. As a result, the court held, the city had abused its discretion in a manner that had denied Cleveland the contract in violation of its federally protected due-process rights and in violation of Section 1983.

{¶16} The court held that the city's SBE program rules and guidelines created race- and gender-based classifications that rendered the program facially unconstitutional. The court further found that the city had pressured and encouraged bidders, including Cleveland, to draw upon race- and gender-based classifications, in violation of Cleveland's rights under Section 1983. But the court held that Cleveland had failed to establish that the denial of the drywall contract was the result of the race- and gender-based classifications; rather, it held that the denial had been the result of the city's preference for small businesses.

{¶17} The court rendered a declaratory judgment that precludes the city from awarding future contracts

to a bidder that exceeds the cap set forth in CMC 321-37 if the bid selection is based primarily on the bidders' compliance with the SBE subcontracting-outreach program.

{¶18} The court permanently enjoined the city from maintaining or applying race- or gender-based classifications in its SBE rules and guidelines, absent a formal determination that such race-based provisions were narrowly tailored and necessary to fulfill compelling governmental interests, or that such gender-based provisions were substantially related to genuine and important governmental objectives.

{¶19} Finally, the court entered judgment in favor of Cleveland as the prevailing party, and against the city, for Cleveland's reasonable attorney fees and costs pursuant to Section 1988, Title 42, U.S.Code. The court also entered judgment in favor of Valley.

{¶20} On appeal, Cleveland argues that the trial court erred by (1) directing a verdict in favor of the city on Cleveland's damage claims; (2) refusing to declare Valley's drywall contract to be void or to prohibit performance under the contract; (3) ruling that Cleveland could not elicit testimony from Valley's subcontractors with respect to post-contract events; (4) denying Cleveland's motion for a new trial; (5) granting the motions to dismiss individual city employees; and (6) making findings concerning causation of damages.

{¶21} In its cross-appeal, the city argues that the trial court (1) erred by applying CMC 321-37; (2) lacked jurisdiction over Cleveland's claims for injunctive relief; (3) erred by concluding that the city

had deprived Cleveland of its right to procedural due process; (4) erred by ruling that portions of the city's SBE program created constitutionally impermissible race- and gender-based classifications; and (5) erred by awarding attorney fees to Cleveland. We first address the city's assignments of error.

The Application of CMC 321-37

{¶22} In its first assignment of error, the city argues that the trial court erred by applying CMC 321-37 in its analysis of Cleveland's claims. The city contends that Franklin had not applied the provisions of CMC 321-37 in her review of bids for the project because the ordinance had not been in place at the time the project's "procurement process" was planned.

{¶23} The record reflects that CMC 321-37 had been adopted in specific contemplation of the convention center project. By its terms, the ordinance had been enacted as an emergency measure due to the city's "immediate need to proceed with the bidding of the Convention Center and major development projects." The ordinance specifically applied to the award of construction contracts that exceeded $100,000. And the ordinance had gone into effect before the project's bid solicitation, and well before the award of the drywall contract. So Franklin's selection of the lowest and best bidder was subject to CMC 321-37.

{¶24} The city argues that "[e]ven though Valley's bid was $1.2 million more than Cleveland's, the project was well within the budget." This argument fails to take into account that "among the purposes of competitive bidding legislation are the protection of

the taxpayer [and the] prevention of excessive costs."[3] The fact that the project was under budget was of questionable relevance and was certainly not dispositive of the legality of the bid-selection process.

{¶25} The city argues that even if Franklin had applied CMC 321-37 to the drywall-contract bids, the ordinance's cap would not have come into play because Cleveland's bid was not an "otherwise qualified" bid. But the city acknowledges in its brief that "[t]he trial evidence established that Cleveland lost because its drywall bid failed to reserve at least 35% of the work for small business enterprises as the bid documents required." In other words, but for its SBE noncompliance, Cleveland's bid was qualified. Where the sole reason that Cleveland's bid was rejected was its noncompliance with the SBE subcontracting-outreach program, Cleveland was an "otherwise qualified" bidder. Under these circumstances, Valley's SBE-compliant bid could not have exceeded Cleveland's bid by the $50,000 or 10% cap.

{¶26} Accordingly, we hold that the trial court properly considered and applied CMC 321-37. We overrule the city's first assignment of error.

Cleveland's Standing

{¶27} In its second assignment of error, the city argues that the trial court lacked jurisdiction over Cleveland's claims for injunctive relief. The city contends that the possibility that Cleveland might bid

---

[3] *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt Dist.*, 73 Ohio St.3d 590, 602, 1995-Ohio-301, 653 N.E.2d 646.

on a city contract in the future did not create a risk that it would again be subject to a deprivation of rights.

{¶28} In Ohio, it is well established that standing to challenge the constitutionality of a legislative enactment exists where a litigant "has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury."[4]

{¶29} In the context of a constitutional challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, and not necessarily the loss of a contract. So to establish standing, a party challenging a set-aside program need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[5]

{¶30} At trial, the city specifically stipulated that Cleveland intended and was able to bid on future city construction projects. And the city's discriminatory policies would have affected Cleveland's ability to compete fairly. So Cleveland had sufficient standing to seek injunctive relief against the city. We overrule the city's second assignment of error.

---

[4] *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 1999-Ohio-123, 715 N.E.2d 1062.

[5] *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville* (1993), 508 U.S. 656, 666, 113 S.Ct. 2297.

Deprivation of a Property Interest

{¶31} In its third assignment of error, the city argues that the trial court erred by concluding that the city had deprived Cleveland of a right to procedural due process.

{¶32} One of the proscriptions of the Fourteenth Amendment is the deprivation of a person's property interests without due process of law.[6] In a due-process challenge based upon such a deprivation, we must first determine whether a protected property interest was at stake.

{¶33} Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[7] A person has a property interest in a benefit, such as a public contract, if the person has a legitimate claim of entitlement to it.[8] A person's unilateral expectation of a benefit is not enough.[9]

{¶34} The Sixth Circuit Court of Appeals has held that a disappointed bidder may establish a legitimate

---

[6] *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 569-570, 92 S.Ct. 2701.

[7] Id. at 577, 92 S.Ct. 2701.

[8] *Cleveland Constr. v. Ohio Dept. of Admin. Servs., GSA* (1997), 121 Ohio App.3d 372, 394, 700 N.E.2d 54.

[9] *Roth*, supra, at 577, 92 S.Ct. 2701.

claim of entitlement to a public contract in one of two ways. A bidder can either show that it actually was awarded the contract and then deprived of it, or that the government abused its limited discretion in awarding the contract to another bidder.[10]

{¶35} Generally, municipalities are vested with broad discretion in matters related to public contracts. But that discretion is not limitless.[11] For example, a municipality "may by its actions commit itself to follow rules it has itself established."[12]

{¶36} In the context of lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their judgment for that of city officials.[13] But where city officials abuse the discretion vested in them, courts will intervene.[14] An abuse of discretion "connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary, or unconscionable attitude. * * * 'Arbitrary' means 'without adequate determining principle; * * * *not governed by any fixed*

---

[10] *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 34; *Enertech Elec. v. Mahoning County Commrs.* (C.A.6, 1996), 85 F.3d 257, 260.

[11] *Danis*, supra, at 604, 1995-Ohio-301, 653 N.E.2d 646.

[12] Id. at 603, 1995-Ohio-301, 653 N.E.2d 646.

[13] *See Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202.

[14] Id. at 21-22, 552 N.E.2d 202.

rules or standard.' * * * 'Unreasonable' means 'irrational.' "[15]

{¶37} In this case, the city had established a "fixed rule" with respect to the award of a contract based primarily upon the bidder's subcontracting-outreach program compliance. In that instance, CMC 321-37 required the city to apply the ordinance's cap.

{¶38} But, here, the evidence demonstrated that the city had arbitrarily ignored the cap in awarding the contract to Valley. Thus, we agree with the trial court that the city's failure to follow the directive of its own ordinance constituted an abuse of discretion that resulted in a deprivation of Cleveland's property interest in the contract award. We overrule the city's third assignment of error.

SBE Program Provisions Were Facially Unconstitutional

{¶39} In its fourth assignment of error, the city argues that the trial court erred by ruling that elements of the rules and guidelines in the city's SBE program created constitutionally impermissible race- and gender-based classifications. The city contends that the program was a lawful "outreach" program that encouraged contractors to use "good faith efforts" to promote opportunities for minorities and females.

{¶40} The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local

---

[15] *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (emphasis added).

governments.[16] Racial classifications must serve a compelling government interest and must be narrowly tailored to further that interest.[17] Gender-based classifications, by contrast, require an "exceedingly persuasive" justification.[18]

{¶41} At trial, the city did not put forth any argument or evidence to demonstrate that its SBE program could withstand such heightened scrutiny. Instead, the city relied on its assertion that increased scrutiny should not apply in the first instance because its SBE program created neither race- nor gender-based classifications.

{¶42} On appeal, the city acknowledges that it had predetermined estimates of the availability of minorities and females for each trade represented in the convention center project. But the city argues that its availability estimates were for informational purposes only, and that bidders were required to do nothing in response.

{¶43} Racial or gender classifications may arise from a regulation's strict requirements, such as mandated quotas or set-asides. But rigid mandates are not a prerequisite to a finding of a racial

---

[16] *Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469, 109 S.Ct. 706.

[17] *Adarand Constructors v. Pena* (1995), 515 U.S. 200, 235, 115 S.Ct. 2097.

[18] *United States v. Virginia* (1996), 518 U.S. 515, 533, 116 S.Ct. 2264.

classification.[19] Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny.[20]

{¶44} For example, in *Adarand Constructors v. Pena*,[21] the United States Supreme Court considered federal regulations that provided financial incentives to bidding contractors to hire minority subcontractors. The regulations did not require contractors to use minority subcontractors. But contractors would receive additional compensation if they did so. The court held that, to the extent that the regulations provided incentives to contractors to use race-based classifications, the regulations were subject to strict scrutiny.[22]

{¶45} In determining whether strict scrutiny must be applied to the city's SBE program, we must look behind its ostensibly neutral labels such as "outreach program" and "participation goals." The program's rules and guidelines "are not immunized from scrutiny because they purport to establish 'goals' rather than 'quotas.' [Courts] look to the economic realities of the program rather than the label attached to it."[23]

---

[19] *Bras v. Calif. Pub. Utils. Comm.* (C.A.9, 1995), 59 F.3d 869.

[20] *See Lutheran Church-Missouri Synod v. FCC* (C.A.D.C., 1998), 154 F.3d 487; *Monterey Mechanical Co. v. Wilson* (C.A.9, 1997), 125 F.3d 702; *Safeco Ins. Co. of America v. White House* (C.A.6, 1999), 191 F.3d 675.

[21] (1995), 515 U.S. 200, 115 S.Ct. 2097.

[22] Id. at 224, 115 S.Ct. 2097.

[23] *Bras*, supra, at 874.

{¶46} Under the city's SBE rules and guidelines, all bidders were required to use "good faith efforts" to promote opportunities for minority- and women-owned businesses (MBEs and WBEs) to the extent of their availability as determined by the city. With respect to the drywall portion of the project, the city estimated that the availability of MBEs was 13.09%, and that it was 1.05% for WBEs.

{¶47} Bidders were required to provide detailed descriptions of the techniques used to obtain participation of MBEs and WBEs. The city would then evaluate each bidder's documented efforts to achieve participation of MBEs and WBEs. If that review determined that a bid's utilization percentage for MBEs and WBEs was lower than the estimated availability for those groups, the bid would be flagged for a discrimination investigation.

{¶48} Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences.[24] Therefore, the program's rules must be subject to strict scrutiny. To the extent that the rules pressured bidders to hire women-owned subcontractors, the city was required to demonstrate an "exceedingly persuasive" justification for the differential treatment.

{¶49} Given that the city effectively conceded that it could not justify race- or gender-based classifications

---

[24] *Safeco Inc.*, supra, at 692, citing *Lutheran*, supra, at 491.

under either standard of heightened scrutiny, the trial court properly determined that those elements of the program that caused bidders to use racial- or gender-based preferences were unconstitutionally impermissible.

Award of Attorney Fees

{¶50} In its fifth assignment of error, the city argues that the trial court erred by awarding attorney fees to Cleveland. The city contends that Cleveland was not entitled to the award because it was not a prevailing party.

{¶51} A "prevailing party" is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[25] To be a "prevailing party," there must have been "a court-ordered 'change [in] the legal relationship' " between the parties.[26] In this regard, a declaratory judgment may serve as the basis for an award of attorney fees.[27]

{¶52} But the entry of a declaratory judgment in a party's favor does not automatically render that party a prevailing party under Section 1988.[28] "In all civil litigation, the judicial decree is not the end but the

---

[25] *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933.

[26] *Buckhannon Bd. v. W. Va. Dept. of Health & Human Res.* (2001), 532 U.S. 598, 604, 121 S.Ct. 1835.

[27] *Hewitt v. Helms* (1987), 482 U.S. 755, 761, 107 S.Ct. 2672.

[28] *Rhodes v. Stewart* (1988), 488 U.S. 1, 109 S.Ct. 202.

means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces–the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." (Emphasis in original.)[29]

{¶53} We hold that the trial court did not abuse its discretion in ordering attorney fees. Cleveland successfully challenged the unconstitutional race- and gender-based provisions of the city's SBE program. As a result, the city will no longer be permitted to apply those provisions against Cleveland or other bidders on city contracts. In that regard, Cleveland was a prevailing party because the judgment had a distinct effect on the city's behavior. Accordingly, we overrule the city's fifth assignment of error.

Directed Verdict

{¶54} In its complaint, Cleveland sought damages for the loss of profits that it would have realized had it been awarded the drywall contract. Cleveland now argues in its first assignment of error that the trial court erred by directing a verdict in favor of the city on its lost-profits claim.

---

[29] *Hewitt*, supra, at 761, 107 S.Ct. 2672.

{¶55} In considering a motion for a directed verdict, a trial court must construe the evidence most strongly in favor of the party against whom the motion is made.[30] In doing so, if the court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."[31]

{¶56} "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence."[32] Because a question of law is presented, we apply a de novo standard of review to a directed verdict.[33]

{¶57} Cleveland acknowledges that the Ohio Supreme Court's recent decision in *Fairlawn v. Cementech*[34] resolves its claim for damages under state law. In *Cementech*, the court held that when a municipality violates competitive-bidding laws in

---

[30] Civ.R. 50(A)(4).

[31] Civ.R. 50(A)(4).

[32] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶4, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus.

[33] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996-Ohio-298, 668 N.E.2d 889.

[34] 109 Ohio St.3d 475, 2006-Ohio-2991, 849 N.E.2d 24.

awarding a competitively bid project, a disappointed bidder cannot recover its lost profits as damages.

{¶58} But in addition to its claim for damages under state law, Cleveland sought damages under federal law, Section 1983, Title 42, U.S.Code, for the city's deprivation of its property interest in the drywall contract. Under Section 1983, a party who has been deprived of a federal right under the color of state law may seek relief through "an action at law, suit in equity, or other proper proceeding for redress."

{¶59} The basic purpose of a Section 1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights.[35] For this reason, no compensatory damages may be awarded in a Section 1983 suit without proof of actual injury.[36] The level of a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts.[37]

{¶60} In *Adarand Constructors v. Pena*,[38] the United States Supreme Court considered whether a rejected bidder had standing to seek injunctive relief against future application of a minority set-aside program. In doing so, the Court presumed that the

---

[35] *Carey v. Piphus* (1978), 435 U.S. 247, 253-254, 98 S.Ct. 1042.

[36] *Memphis Community Sch. Dist. v. Stachura* (1986), 477 U.S. 299, 306, 106 S.Ct. 2537.

[37] Id. at 306-307, 106 S.Ct. 2537.

[38] (1995), 515 U.S. 200, 115 S.Ct. 2097.

rejected bidder was entitled to seek damages for the lost contract:

{¶61} "Adarand, in addition to its general prayer for 'such other and further relief as to the Court seems just and equitable,' specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation classes. * * * Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause *of course entitles it to seek damages for the loss of that contract*[.]" (Emphasis added.)

{¶62} Those damages may include a disappointed bidder's lost profits.[39] In *W.H. Scott Constr. Co., Inc. v. Jackson,*[40] the Fifth Circuit Court of Appeals considered an equal-protection challenge to a policy encouraging minority participation in city construction projects. The court upheld an award of lost profits to a rejected bidder who had sought damages from the city under Section 1983.

{¶63} Similarly, in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade Cty.*, Fla.,[41] the court held that a county was liable to the plaintiffs under Section 1983 for any compensatory damages resulting

---

[39] See *Flores v. Pierce* (C.A.9, 1980), 617 F.2d 1386, 1392; *Chalmers v. Los Angeles* (C.A.9, 1985), 762 F.2d 753.

[40] (C.A.5, 1999), 199 F.3d 206.

[41] (S.D.Fla.2004), 333 F. Supp. 2d 1305.

from its unconstitutional affirmative-action programs. The court held that the plaintiffs' damages could include their lost profits, but that the plaintiffs in that case had failed to prove that any actual losses had resulted from the unconstitutional programs.[42]

{¶64} In this case, the trial court concluded that Cleveland's failure to adduce evidence concerning the degree of completion of the drywall contract precluded Cleveland from proceeding on its claim for money damages. The court reasoned that Cleveland's damages were speculative, not due to a failure of proof as to Cleveland's anticipated profits, but due to the court's misapprehension that Cleveland's damage claim was wholly dependent on its claim for injunctive relief.

{¶65} Certainly, the status of the drywall project would have been relevant to a determination of any injunctive relief the court may have awarded, but that evidence was not critical to Cleveland's claim for Section 1983 damages. In effect, the trial court's entry of a directed verdict on the damage claim precluded Cleveland from seeking redress, even though Cleveland could have waited to file suit until the drywall contract had been completed. The issuance of a directed verdict on the issue of Section 1983 damages before the contract's completion had the absurd result of denying redress because of Cleveland's diligence in asserting its claims.

{¶66} We recognize that a plaintiff seeking redress under Section 1983 is required to mitigate its

---

[42] Id. at 1339.

damages.[43] But once the plaintiff has presented evidence of damages, the defendant has the burden of establishing the plaintiff's failure to properly mitigate damages.[44] So once Cleveland presented evidence of damages, the burden of proof on the issue of mitigation was on the city.

{¶67} Because a jury could have concluded that Cleveland had established all the elements of its Section 1983 claim for damages, we hold that a directed verdict in favor of the city was unwarranted. Consequently, we sustain Cleveland's first assignment of error in part, reverse the entry of the directed verdict on the Section 1983 damage claim, and remand the case for a new trial on the issues of liability and damages with respect to Cleveland's lost-profits claim under Section 1983.

{¶68} Because Cleveland's fourth and sixth assignments of error relate to the trial court's dismissal of its damage claims, we address the assignments out of order. Cleveland argues that the trial court erred by denying its motion for a new trial, given the court's erroneous dismissal of its damage claim under Section 1983. Cleveland also contends that the trial court erred by making "a finding that, essentially, amount[ed] to a directed verdict on the issue of proximate causation of Cleveland's damages in addition to that given at trial." For the reasons set forth in our disposition of Cleveland's first assignment

---

[43] *Meyers v. Cincinnati* (C.A.6, 1994), 14 F.3d 1115, 1119.

[44] Id., citing *Rasimas v. Michigan Dept. of Mental Health* (C.A.6, 1983), 714 F.2d 614.

of error, we sustain the fourth and sixth assignments of error.

The Denial of Injunctive Relief

{¶69} In its second assignment of error, Cleveland argues that the trial court erred by refusing to declare the drywall contract unenforceable and by failing to enjoin performance of the contract. Cleveland contends that the trial court should have enjoined performance of the contract despite the fact that substantial work had been completed on the project.

{¶70} An appellate court need not consider an issue where the court becomes aware of an intervening event that has rendered the issue moot.[45] The duty of an appellate court is to decide actual controversies between parties and to render judgments that may be carried into effect.[46] "Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration of those issues."[47] For example, in the context of appeals involving construction projects, Ohio courts have held that an appeal is rendered moot where the appellant

---

[45] *Cincinnati Gas & Elec. Co. v. PUC of Ohio*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, at ¶15, citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21.

[46] *Miner*, supra, at 238, 92 N.E. 21.

[47] *Schwab v. Lattimore*, 166 Ohio App. 3d 12, 2006-Ohio-1372, 848 N.E.2d 912, at ¶10.

fails to obtain a stay of execution of the trial court's judgment and construction commences.[48]

{¶71} In this case, there is no dispute that the convention center project, which was substantially completed at the time that the trial court denied the injunction, is now completed in its entirety. At no point in the proceedings did Cleveland obtain a stay of the trial court's denial of its request for a temporary restraining order. In fact, as the trial court pointed out, Cleveland did not pursue preliminary injunctive relief for an entire year. Instead, Cleveland acceded to several continuances. In denying Cleveland's motion for a preliminary injunction, the trial court noted the following:

{¶72} "The court at this time will deny Cleveland's motion for injunctive relief pending trial. The parties' desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on [a] preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period – almost one year after the action was filed and roughly three months prior to the

---

[48] *Schuster v. Avon Lake*, 9th Dist. No. 03CA008271, 2003-Ohio-6587, at ¶3; *Pinkney v. Southwick Invs., L.L.C.*, 8th Dist. Nos. 85074 and 85075, 2005-Ohio-4167; *Bd. of Commrs. v. Saunders*, 2nd Dist. No. 18592, 2001-Ohio-1710; *Smola v. Legeza*, 11th Dist. No. 2004-A-0038, 2005-Ohio-7059; *Redmon v. City Council*, 10th Dist. No. 05AP-466, 2006-Ohio-2199.

scheduled June 20, 2005 trial date – to pursue its preliminary injunction request."

{¶73} At this point, we can not render a judgment that could be carried into effect with respect to the performance of the drywall contract. Even if we concluded (which we expressly do not) that the trial court had erred in failing to enjoin the contract's performance, our opinion would only be advisory in nature. Consequently, we decline to address the assignment of error on its merits.

Evidentiary Rulings

{¶74} In its third assignment of error, Cleveland argues that the trial court erred by ruling that it could not elicit testimony from Valley's subcontractors about events that had occurred after the city had awarded the contract to Valley. In support of its argument, Cleveland directs us to its examination of one of Valley's subcontractors, Marti Stouffer-Heis, owner of MS Construction Consultants.

{¶75} "Relevant evidence" is defined by Evid.R. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 provides that relevant evidence is admissible, subject to enumerated exceptions, and that evidence that is not relevant is not admissible. Although the terms of Evid.R. 402 are mandatory, a trial court is vested with broad discretion in

determining whether evidence is relevant.[49] A reviewing court is, therefore, limited to a determination of whether the trial court abused its discretion in admitting or excluding the disputed evidence.[50]

{¶76} Cleveland's attorney attempted to elicit testimony from Stouffer-Heis about the city's post-award enforcement of its SBE program. Counsel asked whether Stouffer-Heis had been able to perform her described "[l]ogistics, project coordination" tasks at the construction site, and whether the city had performed any investigation upon submission of her request to be certified as an SBE supplier.

{¶77} The trial court indicated that it would allow testimony by a subcontractor with respect to the current status of the uncompleted project. And the court expressly permitted counsel to question Stouffer-Heis about whether she had been certified as an SBE supplier prior to the contract award. But the court instructed counsel to otherwise restrict his questioning to matters that had occurred prior to the contract award to Valley, because Cleveland's complaint had been predicated on the rejection of its bid.

{¶78} We find no abuse of discretion by the trial court in ruling that testimony related to post-award program enforcement was irrelevant and inadmissible. We overrule Cleveland's third assignment of error.

---

[49] See *Cincinnati v. Banks* (2001), 143 Ohio App. 3d 272, 287, 757 N.E.2d 1205; *Siuda v. Howard*, 1st Dist. Nos. C-000656 and C-000687, 2002-Ohio-2292, ¶25.

[50] See *Banks*, supra.

Dismissal of City Employees

{¶79} In its fifth assignment of error, Cleveland argues that the trial court erred when it granted the individual defendants' motion to dismiss. The trial court dismissed Cleveland's claims against city employees Riordan, Franklin, Mullaney, Townsend, and Ranford in their "personal and individual capacities," on the basis of qualified immunity. Cleveland had also sued the employees in their "official capacities." Because the trial court did not explicitly dismiss the claims against the employees in their official capacities, we treat the official-capacity claims as claims against the city.[51]

{¶80} The doctrine of qualified immunity generally shields public officials performing discretionary functions from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[52]

{¶81} The doctrine recognizes the strong public interest in protecting public officials from the costs of defending against claims. A public official's entitlement to avoid the burdens of litigation "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go

---

[51] See *Asher Investments, Inc. v. Cincinnati* (1997), 122 Ohio App. 3d 126, 137, 701 N.E.2d 400; *Norwell v. Cincinnati* (1999), 133 Ohio App. 3d 790, 729 N.E.2d 1223.

[52] *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct. 2727.

to trial."[53] To this end, a ruling on the issue of qualified immunity should be made as early as possible in the proceedings, before the commencement of discovery.[54] "[A] quick resolution of a qualified immunity claim is essential."[55]

{¶82} "Where a defendant official is entitled to qualified immunity, the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity."[56]

{¶83} In this case, Cleveland alleged that the city employees had violated its rights to due process and equal protection by failing to apply the cap in CMC 321-37 and by rejecting its bid as nonresponsive after applying provisions of a race-conscious program. These allegations were insufficient as a matter of law to describe a violation of a clearly established constitutional right. As demonstrated by the complex nature of the issues already discussed, the individual

---

[53] *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526, 105 S.Ct. 2806.

[54] Id.

[55] *Will v. Hallock* (2006), ___ U.S. ___, 126 S. Ct. 952, 960.

[56] *Salt Lick Bancorp v. FDIC* (May 30, 2006), C.A.6 No. 05-5291, ___ F.3d ___, citing *Kennedy v. Cleveland* (C.A.6, 1986), 797 F.2d 297, 299.

defendants could not have reasonably known that their actions were unconstitutional. Accordingly, we overrule Cleveland's fifth assignment of error.

Conclusion

In conclusion, we reverse the trial court's entry of a directed verdict on Cleveland's claim for lost profits under Section 1983. We remand the cause for a new trial on the issues of liability and damages under Section 1983. In all other respects, the trial court's judgment is affirmed.

Judgment accordingly.

HILDEBRANDT, P.J., and PAINTER, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

APPENDIX J

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638
Judge Nelson

[Filed August 29, 2005]

Cleveland Construction,	)
	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, et al.,	)
	)
Defendants.	)
	)

FINAL JUDGMENT ENTRY

This final judgment entry is based on and incorporates in full the court's post-trial entry of July 13, 2005.

As set forth in that prior entry, the court finds and adjudges that:

1) Defendant the City of Cincinnati ("the City") violated the requirements of Cincinnati Municipal Code Section 321-37 ("Bid; Award to

Lowest and Best") in awarding the Convention Center drywall contract at issue to Defendant Valley Interior Systems, Inc. ("Valley") rather than to Plaintiff Cleveland Construction, Inc. ("Cleveland Construction") when the award was "based primarily upon" compliance with the City's Subcontracting Outreach Program and Valley's bid exceeded Cleveland Construction's by $1,246,022.00. That additional cost exceeded the $50,000 cap established by Code Section 321-37, and the City acknowledged that Cleveland Construction was otherwise qualified to perform the work. In making its award, the City abused its discretion in a manner that harmed the public and denied Cleveland Construction the contract in violation of Cleveland Construction's federally protected due process rights and in violation of 42 U.S.C. Section 1983.

2) The City's Small Business Enterprise program Rules and Guidelines as in effect at the time of contract award and trial create race and gender based classifications for which the City claims no compelling governmental interest and offers no basis to satisfy any appropriate intermediate scrutiny review. The program is to that extent unconstitutional on its face. Further, in the process of soliciting bids in this matter, the City did pressure and encourage bidders, including Plaintiff, to draw upon race and sex-based classifications that the City concedes could not withstand the heightened level of review that the court finds mandated by governing law. The City in that regard violated Cleveland Construction's rights under 42 U.S.C. Section

1983. However, Cleveland Construction failed to establish that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract at issue.

Further, the court enters a declaratory judgment, in favor of Cleveland Construction and against the City, that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of the bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or fifty thousand dollars.

The court also enters a declaratory judgment, in favor of Cleveland Construction and against the City, that the City's SBE Rules and Guidelines as of the date of trial, and as promulgated by the City as official policy pursuant to City ordinance, contain race and sex based classifications that violate the equal protection clause of the United States Constitution.

The court also enters judgment against the City by permanent injunction prohibiting the City from maintaining or applying any iteration of the SBE Rules and Guidelines provisions specified at pages 13-14 of the court's July 13, 2005 post-trial entry, or any substantially comparable provisions making race or gender based classifications through similar formulations, absent a formal, public determination by

the City establishing that such provisions are, in the case of racial classifications, narrowly tailored to advance a compelling governmental interest, or, in the case of gender classifications, substantially related to genuine and important governmental objectives. The court notes that the City acknowledged during this litigation that it was not in a position to make such showings. For the reasons set forth in its July 13, 2005 entry, the court does not enjoin drywall work (well under progress at this stage) with regard to the Convention Center project.

The court also enters judgment in favor of Cleveland Construction, as the prevailing party and against the City, for its reasonable attorney fees and costs pursuant to 42 U.S.C. Section 1988, in the amount of $433,290.00. In arriving at that figure, the court has declined to award fees for certain preliminary and post-trial activities and for certain matters relating to potential expert witness testimony on matters not directly relevant to the issues presented to the court. The court has reviewed Cleveland Construction's fee application in light of prevailing standards (*see, e.g., Grycza v. Steger* [6th Dist. App. 1994], 97 Ohio App. 3d 82, 84 ["ordinarily a prevailing plaintiff should recover its attorneys fees"]; *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept Health and Human Resources* [2001], 532 U.S. 598; *Morscott, Inc. v. City of Cleveland* [6th Cir. 1991], 936 F.2d 271 [absent special circumstances, trial court "'must'" award fees to the prevailing plaintiff]), and with regard for the degree of success obtained through judicially enforceable remedies that alter the contemplated future legal relationship of the parties. The court does not find the City's memorandum in opposition to any fee award persuasive (including the

City's less than full account of its shifting positions on whether its own Rules and Guidelines even had been formally promulgated, *cf.* City's May 11, 2005 brief at 13 arguing that the Rules and Guidelines as attached to Cleveland Construction's amended complaint "do not have the force of law" and are not "official policy" a matter of significance to both prongs of Plaintiff's action).

Court costs as recorded by the Clerk of Courts are assessed to the Defendants to be shared equally between them. Although Valley's legal arguments did not prevail to the (very considerable) extent that they mirrored the arguments of the City on those issues as to which the court awards judgment to Plaintiff Cleveland Construction against the City, the court awards no separate relief against Valley and enters judgment for Valley to that effect for the reasons stated in the July 13, 2005 post-trial entry.

This is a final order and there is no just cause for delay. The Clerk of Courts is directed to serve notice of this final judgment upon the parties in accordance with the civil rules.

SO ORDERED

/s/ Fred Nelson
Fred Nelson
Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202 (fax: 381-9206)

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202 (fax: 852-8222)

APPENDIX K

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638
Judge Nelson

[Filed July 13, 2005]

Cleveland Construction, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, et al.,	)
Defendants	)
	)

ENTRY

This matter proceeded to a trial on the merits of Plaintiff's case combined with an evidentiary hearing on Plaintiff's Motion for Preliminary Injunction pursuant to Civil Rule 65(B)(2) and under a schedule referenced in the court's May 13, 2005 Entry Denying Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and [preliminary] Injunctive Relief [SJ Entry]. That prior entry sets forth in some detail the legal context of this action, which arises from a dispute relating to drywall work for the expansion and

renovation of Cincinnati's Convention Center. A jury was impaneled to address certain issues in the case, after the court granted the motion of Defendant the City of Cincinnati, for a directed verdict with regard to Plaintiff Cleveland Construction, Inc.'s, claim for lost profits, as referenced below, the parties agreed that the litigation should proceed as a trial to the court and the jury was discharged by the consent of all sides (a matter as to which Plaintiff subsequently took some issue). The trial now has concluded, and the court has heard the evidence and counsels' closing arguments and also has reviewed the final materials presented in writing.

I. The City violated its Code requirement that a determination to award a City contract primarily on the basis of compliance with the City's Subcontractor Outreach Program (designed to favor subcontracting to small businesses) not cost taxpayers more than $50,000 beyond the amount submitted in a lower and otherwise qualified bid

The evidence is clear and the parties agree that in the determinative second round of bidding to perform the drywall work, the bid submitted by Plaintiff Cleveland Construction, Inc. ("Cleveland," or "Plaintiff") was lower by $1,246,022.00, than the bid submitted by Defendant, Valley Interior Systems, Inc ("Valley") Nonetheless, Defendant City of Cincinnati ("the City") awarded the drywall contract to Valley as the "lowest and best" bidder because Valley agreed to subcontract at least 35% of the work to small business enterprises ("SBEs") while Cleveland did not. Defendants have maintained throughout this litigation that Plaintiff Cleveland was excluded from contract consideration because it failed to meet the City's SBE

requirement the evidence provides no indication of other infirmities in Cleveland's bid or capacity to perform the work, and the City previously had conceded that Cleveland was otherwise qualified to perform the work, *see* SJ Entry at 10. The court finds that the City's 35% SBE requirement was the only reason that the City awarded the contract to Valley rather than to Cleveland despite the one and a quarter million dollar difference between the bids.

The City's Code section 321-37, "Bid, Award to Lowest and Best," provides in part:

> "(a) Selection of Lowest and Best in Award of City Contracts. Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder ...
>
> (c) Factors to be Considered. Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, but are not limited to [prior performance, prevailing wage history, compliance with nondiscrimination rules, and] *(4) Information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued by the city manager pursuant to section 323-31*
>
> *In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower,"* (emphasis added).

As the court noted in its SJ Entry, the language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is indeed selected "based primarily" on that factor, the City may proceed to award the contract "subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower," 321-37(c)(4).

In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor." The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis. As the court also observed in its SJ Entry at 15, the City Administration, through then Assistant City Manager Rashid Young, advised Cincinnati City Council's Law and Public Safety Committee prior to enactment of this 10%/$50,000.00 cap that, "[w]hat this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant [bidder] if they are not the lowest. This ordinance would allow us to award a bid if the bid is $50,000.00 or less difference away from the lowest bid. We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid, and it doesn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE." This explanation of a taxpayer protection

rationale for the cap is fully consistent with the Code language that Cincinnati Council promptly adopted.

The 321-37(c) cap protecting Cincinnati taxpayers from having to pay more than $50,000.00 extra (extra, that is, beyond the amount established by a lower and otherwise qualified bid) for the benefit of SBE Subcontracting Outreach Program compliance was adopted in specific contemplation of the Convention Center project; it took effect only months before the contract at issue was awarded. *See* Plaintiff's trial exhibit 13-A (noting that "this ordinance is an emergency measure. The reason for the emergency is the immediate need to proceed with the bidding of the Convention Center and major development projects, which may be impacted by Section 321-37 of the Cincinnati Municipal Code.")

The court parsed the language of 321-37 at some length in its SJ Entry (pages 10-23), and incorporates here that statutory construction. As earlier observed, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with 'SBE Subcontractor Outreach Program rules,' issued pursuant to 323-31 ['Subcontracting Outreach Program']" Code 321-37(c). (The Code's reference to program "rules" rather than to the program itself reflects a rather unusual drafting approach through which City Council adopted its Subcontracting Outreach Program simply by reference to a consultant's recommendations and through authorization of administratively promulgated rules in the absence of any further legislative definition of the Program Code 323-31.)

Until the eve of trial, the City had maintained that, despite the clear instruction of Code Section 323-31 requiring that the "City Manager shall issue rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program," the City had not formally promulgated its Small Business Enterprise Program Rules and Guidelines containing Subcontracting Outreach Program rules. *See, e.g.*, City's March 11, 2005 Memo Opposing Plaintiff's MSJ at 13. At trial, however, the City stipulated that the Small Business Enterprise Program Rules and Guidelines introduced as Plaintiff's exhibit 17 are what they purport to be and were, in fact, adopted as of April 1, 2003. Those Rules and Guidelines set forth at pages 4-22 the "Components of the [City's] SBE Program," including (at 9-14) the "Subcontracting Outreach Program."

As established by the City, the "Subcontracting Outreach Program applies to City-funded construction contracts of $100,000.00 or more." *Id.* at 9. Further, the "Subcontracting Outreach Program requires bidders to make subcontracting opportunities available to a broad base of qualified subcontractors and achieve a minimum of 20% (which may be higher for construction of buildings) SBE subcontractor participation. *To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to qualified available SBE subcontractors.*" *Id.* (emphasis added). *See also* Plaintiff's trial ex. 5, the "legislative recommendation" that City Council adopted by reference in establishing the SBE Subcontractor Outreach Program and in authorizing promulgation of rules and regulations therefore ("Failure to comply with the City's Subcontracting Outreach Program will cause a bid to

be rejected Terms and conditions of this Subcontracting Outreach Program apply to City-funded construction projects of $100,000.00 or more"). Thus, the Subcontracting Outreach Program is a subset of the City's broader Small Business Enterprise Program, it applies to all City construction projects costing $100,000.00 or more, and it incorporates requirements that a certain "minimum percentage" of a bid go to qualified SBEs. With regard to covered projects, the Subcontracting Outreach Program establishes mechanisms for assuring a more firm particularized, and project-specific SBE requirement than the aspirational city-wide annual "goal" of 30% SBE participation set forth at Section 323-7 of the Code. *See also, e.g.*, trial testimony of City consultant Rodney Strong (mandatory aspect of Subcontracting Outreach Program minimum percentage requirements).

Having considered all of the evidence adduced, the court finds by clear and convincing evidence that the award of the contract at issue here was "based primarily" upon "information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued pursuant to section 323-31." Valley won the contract on re-bid because it exceeded the 35% SBE participation figure that the City established for this project under the SBE Subcontracting Outreach Program, while Cleveland did not. Plaintiff's trial exhibit 32, for example, is a City bid document issued to the bidders on this project and setting forth the applicable "SUBCONTRACTING OUTREACH PROGRAM SUMMARY." That program summary prominently featured the "SBE Goals Per Trade Contract Cincinnati Convention Center," establishing that "All bidders are required to meet the

goal stated for the individual trade contract Drywall 35%." The Subcontracting Outreach Program, to the extent of its legislative formulation, was in place at the time of bid solicitation and the contract award (and was to be applied to construction contracts of $100,000.00 or more). *See also, e.g.,* Riordan trial testimony and Plaintiff's trial ex. 56 (1/21/03 memo contemplating application to Convention Center project of legislation containing Subcontracting Outreach Program authority). In place later, but also in effect by the time of bid solicitation and award, was the $50,000.00 taxpayer protection cap on the amount that the program could cost the City on any one contract -- and that limitation was part of a package enacted specifically in contemplation of the Convention Center project. That the cap was not in place during initial planning stages of the project does not obviate its mandate once enacted.

Thus, the court finds that the City did violate a specific prohibition of its own municipal Code in awarding the drywall contract to Valley as the "lowest and best bidder" over Cleveland in order to favor small business enterprise subcontracting despite the additional cost to taxpayers of some $1,246,022.00 (an excess expenditure of $1,196,022.00 beyond what the 321-37 cap permits). Cincinnati's local rules limit the discretion of contracting officials in awarding such contracts where the officials purport to be determining the "lowest and best" bid. Where the City publicly determines that a lowest and best bid is not "in the best interest of the city," it may reject such a bid for that reason, *see e.g.,* Code 321-67, but the law requires that it do so plainly and openly (and for some legitimate, non-arbitrary reason, *see City of Dayton, ex rel. Scandrick v. McGee* [1981], 67 Ohio St. 2d 356).

Where no such other rationale exists and the City purports to award a contract on the basis of the "lowest and best" bid, it is constrained by the standards it has established at 321-37, including the cost cap for awards where the lowest and best determination is based primarily on Subcontracting Outreach Program rules.

In determining whether the City abused its discretion under Ohio law and deprived Plaintiff Cleveland of a constitutionally protected property interest without due process of law by awarding the contract in a manner contrary to governing Code, the court refers to its discussion of the applicable legal standards from its SJ Entry: "'The meaning of the term 'abuse of discretion' ... connotes more than an error of law or judgment, it implies an unreasonable, arbitrary or unconscionable attitude.' 'Arbitrary' means 'without adequate determining principle, *** not governed by any fixed rules or standard'. 'Unreasonable' means 'irrational' " *Cedar Bay Construction, Inc. v. City of Fremont et al.*, 50 Ohio St. 3d 19, 22, citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the 'lowest and best bidder.' [I]n the absence of evidence to the contrary, public officers [and] administrative officers, within the limits of the jurisdiction conferred by law, will be presumed not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "'is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion.' " *Id.* at 21 (citation omitted). *See also, e.g., Greater Cincinnati Plumbing*

Contractors' Association v. City of Blue Ash (1st Dist. 1995), 106 Ohio App. 3d 608, 613-14 (a charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C.735.05], "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation, rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v. Ohio Department of Administrative Services* (10th Dist. 1997), 121 Ohio App. 3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of officials as to whom the contract should be awarded" and that discretion was abused in depriving the bidder of the award. *Id.* at 394-95 (no abuse of discretion found), *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co. Commissioners* (6th Cir. 1996), 85 F.3d 257, 260. ("A constitutionally protected property interest in a publicly bid contract can be demonstrated [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract', no abuse of discretion found), *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6th Cir. 1989), 890 F.2d 416 ("if the board had limited discretion under local rules as to whom should be awarded the contract, then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate," no

property interest where state guidelines were nonexhaustive), *cf. United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992), 960 F.2d 31, 34 ("Michigan law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"), *Cementech, Inc. v. City of Fairlawn* (Ohio 9th Dist. App.), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete), *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2nd Dist. App.), 1996 WL 303591 ("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"), *Miami Valley Contractors, Inc. v. Oak Hill* (4th Dist. App. 1996), 108 Ohio App. 3d 745, 752 (no abuse of discretion found, "we can find no support for the proposition that a second- or third-place finisher in a lowest and best bidder determination acquires a constitutionally protected property right").

Having heard the evidence at trial, the court finds that the City did abuse its discretion in a manner that harmed the public and denied Cleveland the contract award, and that Cleveland did have a "legitimate claim of entitlement" sufficiently clear under the Code (with its 321-37 cost cap) to establish a due process violation. The City established a "fixed rule," in the language of *Cedar Bay*, that it then ignored when it awarded the contract to Valley based primarily on SBE attainment, despite the City Code's instruction that such SBE requirements should not cost the taxpayers more than $50,000 per contract. *Cf. Greater Cincinnati Plumbing Contractors' Ass'n. v. City of Blue Ash* (1st Dist. App. 1995), 106 Ohio App. 3d 608, 614

("Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its various forms'," quoting *Cedar Bay), Scandrick*, 67 Ohio St. 2d at 360. ("While municipal governing bodies are necessarily vested with wide discretion, such discretion is neither unlimited not unbridled. The presence of standards against which such discretion may be tested is essential, otherwise, the term 'abuse of discretion' would be meaningless"), *Mechanical Contractors Ass'n. of Cincinnati v. University of Cincinnati* (10th Dist. App. 2001), 141 Ohio App. 3d 333, 343 (public entitles should not be at liberty "to violate laws intended to benefit the public" in contracting), *Cementech*, 2005 WL 844948.

II. The City's Small Business Enterprise Program, as reviewed in light of its SBE Rules and Guidelines, contains elements that create race and gender based classifications for which the City claims no compelling governmental interest. The program is to that extent unconstitutional. As applied in this case, however, those unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated without regard to race or gender

Plaintiff asserts and the City concedes that Plaintiff intends and is positioned to bid on future City contracts and that it has standing to mount an equal protection clause challenge to the City's SBE program as that program currently is constituted.

Very significantly to this assessment, the City has stipulated that it lacks the necessary factual basis to withstand any "strict scrutiny" review of its SBE program. If any part of the SBE program must comply with strict scrutiny standards in order to survive constitutional challenge, the City agrees that such elements must be invalidated as unconstitutional at this time. That is, the City concedes that it is not in a position to prove any "compelling governmental interests" that could sustain a racial classification program no matter how "narrowly tailored." The City also has failed to present or argue any significant evidence showing that its program could satisfy any "intermediate scrutiny" review.

Justice O'Connor has set forth the determination by the United States Supreme Court that "the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments," *Adarand Constructors, Inc. v. Pena* (1995), 515 U.S. 200, 222, citing *Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469. "'A free people whose restitutions are founded upon the doctrine of equality' should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.* at 227, *see also, e.g., Grutter v. Bollinger* (2003), 539 U.S. 306, 326 (strict scrutiny required for all governmentally imposed racial classifications), *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997)("burden of justifying

different treatment by ethnicity or sex is always on the government"). Given the City's stipulations on standing and strict scrutiny, the court is required to examine whether the City's SBE program imposes classifications subject to such heightened review.

Plaintiff points to nothing in the Constitution or laws of the United States or of the State of Ohio that creates a heightened standard of judicial review for a governmental program that simply favors small business enterprises at the expense of larger competitors. The issue here is not classification by size, but rather by race or gender.

Further, the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender. Thus, for example, the fact that the City reviews statistics relating to contract awards to Minority Business Enterprises ("MBEs," as defined at 323-1-M) or Women's Business Enterprises ("WBEs," as defined at 323-1-W) pursuant to 323-17 ("City Maintained Records and Reports") itself does not establish a requirement of heightened scrutiny. *See, e.g., Croson*, 488 U.S. at 492 (plurality op. of O'Connor, J.) ("a state or local subdivision has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction ... and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment"). Even the identification of specified "MBE/WBE annual

participation goals," to be used in conjunction with "monitor[ing], track[ing], and report[ing]" purposes alone, as set forth in 323-7(a), without further mechanism to promote or effectuate or encourage others to meet such goals in any particular context, may not threaten cognizable injury to this Plaintiff. *Cf. Safeco Ins. Co. v. City of White House, Tenn.* (6th Cir. 1999), 191 F.3d 675, 690, 692 (cited in filings made by both parties and in City's proposed jury instructions) ("Outreach efforts may or may not require strict scrutiny," citing authority for proposition that such scrutiny generally does not apply to outreach efforts targeting particular race).

However, "where 'outreach' requirements operate as a *sub rosa* racial preference – that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors – courts must apply strict scrutiny." *Safeco,* 191 F.3d at 692. The City's Small Business Enterprise Program Rules and Guidelines, disavowed by the City as unofficial until the eve of trial and then acknowledged as formally promulgated as of April 1, 2003, *see* Plaintiff's trial exhibit 17, contain a number of such elements when reviewed as a complete program. The City's Rules and Guidelines state, for example, that:

1) "all bidders are required to use good faith efforts to promote opportunities for Women and Business Enterprises to participate in *to the extent of their [governmentally specified] availability*, contracting. Prior to the award of any contract related to construction services or professional services, the City shall evaluate each bidder's documented efforts to achieve the participation of minority and women business

enterprise firms." Rules and Guidelines, Plaintiff's trial exhibit 17, at 5 (emphasis added), *cf. Virdi v. Dekalb Co. School Dist.* (11th Cir. 2005), 2005 WL 1389942 (nonbinding "goals" for "minority vendor involvement" linked to specific notice and advertising outreach programs are racial classifications subject to strict scrutiny).

2) "Upon its successful completion, the Non-Discrimination Program [component of the SBE program] will result in utilization of minority and women owned firms *to the extent of their [governmentally specified] availability*." Rules and Guidelines at 6 (emphasis added).

3) "The City will evaluate efforts made by bidders to promote opportunities for minority and women owned firms to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. If the evaluation determines that a bidder has failed to *achieve* levels of minority and women business enterprise *participation* as might be reasonable on the basis of objective data regarding availability and capacity of such business, the bidder shall be subject to an inquiry by the Office of Contract Compliance." *Id.* at 6 (emphasis added), *cf. MD/DC/DE Broadcasters Assn. v. Fed. Communications Com.* (D.C. Cir. 2001), 236 F.3d 13 (potential investigation of recruitment efforts based on applicant pool numbers is a "powerful threat" giving rise to strict scrutiny review).

4) "Bidders [operating under the Subcontracting Outreach Program] should be able to include the participation of minority and female firms at the levels of availability determined in the City of Cincinnati Disparity Study." Rules and Guidelines at 9 (referencing a study that the City concedes does not reflect a compelling governmental interest in pursuing a program of racial classification).

5) "[Using form 2007,] [o]fferor will provide a detailed description of the techniques used to obtain participation of minority and women owned business enterprise ... " *Id.* at 43.

6) "Utilizing the bidder's utilization form (Form 2003) and total bid amount, the actual utilization percentage is calculated. This is accomplished by taking the amount of the subcontracts awarded to minority and women-owned businesses and dividing by the total bid amount. If this amount is equal to the estimated availability, then no further inquiry is needed. If the actual utilization is less than the estimate, then further inquiry is warranted. The contract administrator must look at the bidder's solicitation form and contact the minority and women-owned businesses listed on the form to verify that they were contacted by the bidder and what their response was. The administrator must also review the good faith efforts taken by the bidder. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual

[government specified] availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." *Id.* at 46; *cf. MD/DC/DE Broadcasters, supra.*

7) [From the "Pre-bid/Outreach Session Script for Contract Administrator"] "Bidders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project. [I]f it is feasible that the work can be broken into two or more smaller units, then it should be done so as to permit maximum participation, based on the availability estimate." Rules and Guidelines at 49 (emphasis added).

8) Every bidder is to submit a "Statement of Good Faith Efforts" certifying that, "we have utilized the following methods to obtain the *maximum practicable participation* by small, minority and women-owned business enterprises on this project." *Id.* at Form 2007 (emphasis added).

As constituted, therefore, to include the officially promulgated Rules and Guidelines authorized and required by Code 323-5, the City's Small Business Enterprise Program contains a variety of elements through which the City makes classifications by race and sex and "indisputably pressures" contractors to recruit and use subcontractors on those terms. This case is different from many other cases involving government race and sex classifications in that the

City advances no evidence to suggest that these elements of its program could withstand the heightened scrutiny applied under U.S. Supreme Court precedents. The constitutional inquiry is foreshortened because the City concedes that it cannot satisfy any strict scrutiny review of its program. Thus, the program is unconstitutional on its face to the extent that the City engages in classification by race or sex with regard to City contracting in construction projects. To that extent, as identified above, Plaintiff prevails on its facial challenge under 42 U.S.C. Section 1983.

With regard to the application of those unconstitutional program elements to the facts of this case, the court notes that there is no evidence that any bidder on the contract at issue was privy to the Rules and Guidelines document itself. The court further notes, however, that both Cleveland and Valley did, in fact, (and without protest by Cleveland until after the contract was awarded to Valley) submit form 2007 ("Statement of Good Faith Efforts") certifying their efforts "to obtain the maximum practicable participation by small, minority and women-owned business enterprises on this project." *See, e.g.*, Plaintiff's trial ex. 28. Those certifications were made after all bidders were provided the "Subcontracting Outreach Program Summary" sheet for the project that included this directive from the City. "You will also find on the cover of this bid document an Availability Determination [of "13.09% Minority /1.05% Female" for the drywall work, *see* Availability Estimation Sheet at Plaintiff's trial ex. 28]. These figures are percentages based on a review of the City's vendor list and certified minority and women-owned businesses.

Bidders should be able to include minority and female firms at the level of availability indicated." Plaintiff's trial exhibit 32 (emphasis added). The City also informed bidders through Addendum 3 to the bid documents that "If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However, we expect the utilization of SBEs to be reflective of the availability estimates." *See* Plaintiff's trial exhibit 70.

Thus, in the process of soliciting bids, the City did in those respects pressure and encourage bidders to draw upon race and sex-based classifications that the City concedes could not withstand any appropriate heightened review on the facts to which the City is privy. The trial elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages, Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35% SBE requirement. Indeed, Plaintiff's own chief estimator on the project did testify that in seeking to gain the contract award, his focus in this area was on boosting his company's small business enterprise inclusion rate, and not on attaining any particular MBE or WBE percentages. Valley did not meet the specified WBE percentage, and no evidence was presented at trial that the City rejected any Convention Center bid on the basis of MBE or WBE availability estimates. The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's requirement that 35 percent of the work go to small business enterprises and Cleveland's bid did not.

With regard to the unlawful discrimination component of the case, therefore, Plaintiff here is much in the posture of the plaintiff in the case that it cites of *Virdi v. Dekalb County School District* (11th Cir. 2005), 2005 WL 1389942. There, the federal court of appeals determined that a school district's aspirational "goals" for minority involvement in contracting, coupled with specific mechanisms for public outreach, created racial classifications that were not narrowly tailored to meet strict scrutiny review, "the program is facially unconstitutional." The court held that, "[n]evertheless, the District is still entitled to judgment on Virdi's intentional discrimination claim. While the [program's] goals themselves are unconstitutional, they do not constitute evidence that Virdi himself was discriminated against. Virdi has failed to establish a causal connection between the unconstitutional aspect of the [program] and his alleged injury.

Moreover, there is insufficient other evidence to impose liability upon the District for damages to Virdi for intentional discrimination." Similarly here, Cleveland has not established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract award. *Cf. Florida General Contractors v. Jacksonville* (1993), 508 U.S. 656 (traceability requirement).

Nor has Plaintiff met its burden of proof to establish that the City's stated policy to favor small businesses (to the extent that the practice does not cost taxpayers more than $50,000 per major construction contract) is in reality a sham to mask invidious discrimination. The court notes as an aside that the City's policy of encouraging small business

participation well predates the Subcontracting Outreach Program components of which Plaintiff complains. Further, the court observes that Cincinnati's City Council, at the urging of the Administration, has indeed opted to limit application of Subcontracting Outreach Program small business preferences to circumstances in which such preferences would not add more than $50,000 to the cost of a contract. While that newly enacted taxpayer protection cap was not observed in this instance, the evidence does not establish that the provision was ignored as part of a scheme to further race or sex based distinctions, and the fact that the cap was adopted by Code certainly does not further the intentional discrimination theory. Moreover, for example, the City's rejection of all the initial drywall bids, including Valley's, does not bolster the theory that the City's stated preference for SBEs was used here as a "sham" to mask improper considerations of race or sex. Further still, evidence was adduced that the City did award other contracts on the Convention Center project to bidders who did not include any MBE or WBE participation.

In short, Plaintiff has demonstrated that the City's SBE program contains certain race and sex based classifications that cannot pass constitutional muster as constituted at this time, Plaintiff has not established, however, that those aspects of the program caused Plaintiff to lose award of the drywall contract at issue in this case. *Cf. Texas v. Lesage*, 528 U.S. 18 (1999) ("where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting

relief under [Section] 1983" on an 'as applied' challenge).

III. Having prevailed on its abuse of discretion / due process Section 1983 claims and on its claim that specific portions of the City's SBE Rules and Guidelines are unconstitutional on their face, Cleveland is entitled to certain declaratory and injunctive relief. Cleveland also is entitled to its reasonable attorney's fees under 42 U.S.C. Section 1988. Cleveland did not establish, however, that the court should use its equitable powers to enjoin ongoing work with regard to the Convention Center project itself

The injunctive and declaratory relief sought by Cleveland involve both the administration of future City construction contracts and the disposition of the current Convention Center drywall project.

Plaintiff is entitled to a declaration that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or Fifty Thousand Dollars. The City Administration professed to know the meaning of that Code subsection at the time it was considered by Council; the court trusts that now that further attention has been drawn to the existence of the subsection (and to the high cost to taxpayers of ignoring it), and now that the City has acknowledged the status of its Subcontracting

Outreach Program rules and regulations, no injunctive mandate with regard to future contracts is necessary with regard to that provision of law. Plaintiff Cleveland further is entitled to a declaration that the conduct of the City in ignoring the cost cap deprived Cleveland of a property interest without due process of law.

Plaintiff also is entitled to a declaration that the City's SBE Rules and Guidelines in their current form contain certain race and sex based classifications as enumerated above that, in light of the City's admission that it cannot now offer a compelling governmental interest to satisfy "strict scrutiny" review as required by governing United States Supreme Court precedent, violate the equal protection clause of the U.S. Constitution. The court will enjoin the City from applying those specified Rules and Guidelines provisions to any City construction project absent a formal determination and public showing by the City that such provisions are narrowly tailored to advance a compelling governmental interest of the sort that the City concedes it cannot now establish. Now that the City has acknowledged the status of its Rules and Guidelines, and now that these particular classifications have been identified, and the City has conceded that it is unable to meet any strict scrutiny review, the City is expected to take prompt steps to remove all unconstitutional provisions from its Rules and Guidelines. In this regard, the court is heartened by the City's stated commitment in the Rules and Guidelines (at page 8) to ensure that, "Businesses awarded City contracts shall prohibit discrimination against any person or business on the basis of race, color, sex, religion, disability or national origin. Such businesses shall develop a policy statement to be

communicated regularly to all persons and entities involved in the performance of their contracts, and shall conduct their contracting and purchasing programs so as to discourage any discrimination and to resolve all allegations of discrimination."

In considering Cleveland's request for injunctive relief with regard to the Convention Center drywall contract at issue, the court is mindful that, "A party seeking a permanent injunction must show [that it has 'a right to relief under the applicable substantive law,'] that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law. [Such] party must ordinarily prove the required elements by clear and convincing evidence." *Procter & Gamble Co. v. Stoneham* (1st Dist. App. 2000), 140 Ohio App. 3d 260, 267. The merits of Cleveland's claims, including its showing that the City abused its discretion in disregarding the $50,000 cost cap under Code Section 321-37, have been discussed above.

Regarding the question of an adequate remedy at law, the court observes that the Defendants' consistent position up to and into trial was that Plaintiff is limited in this action solely to its requests for injunctive and declaratory relief, and that money damages are not an appropriate remedy for Plaintiff's claims. *See, e.g.,* City's May 27, 2005 pretrial statement at 2 ("The City also challenges Cleveland's ability to recover its alleged 'lost profits' "), City's Motion in Limine to Preclude Plaintiff from Presenting Evidence of Lost Profits; City's June 13, 2005 Reply to Response to the Motion in Limine Regarding Lost Profits ("Because Cleveland's only claim is for injunctive relief, Cleveland also is not entitled to a jury

trial. Cleveland's constitutional rights, and any claim for redress, can be handled through an action in equity by filing and seeking injunctive relief. Not only does an action for injunctive relief protect Cleveland, but it also protects the taxpayers from having to pay twice for a public project"), City's June 20, 2005 Memorandum Citing Additional Authority on the Recovery of Lost Profits ("in Ohio lost profits are not available and only injunctive relief available to the plaintiff").

The court agreed with the City that lost profits are not a remedy available under Ohio law to a disappointed bidder on a public contract. *See, e.g., O'Rourke Construction Co. v. Cincinnati Metropolitan Housing Authority* (1st Dist. App. 1982), 1982 WL 8613 at n.5 ("We can find no award of damages from public funds even though the contract was given to another bidder as the result of abuse of discretion"); *Hardrives Paving & Constr., Inc. v. Niles* (1994), 99 Ohio App. 3d 243, 247-48 ("The fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits. [I]f we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. However, if injunction is the sole remedy, both the public and the bidders themselves are protected"), *Cavanaugh Bldg. Corp. v. Cuyahoga Cty. Bd. Of Commrs.* (8th Dist. App. 2000), 2000 WL 86554. The court disagreed with the City's proposition, however, that it "must apply state law for purposes of defining the scope of damages under [federal Section] 1983," *cf.* City's June 16, 2005 Motion to Clarify at 2, and concluded that violations of federal law under Section 1983 can give rise to money

damages including lost profits where injunctive relief alone would not make a plaintiff whole. *See, e.g., Carey v. Piphus* (1978), 435 U.S. 247, 257-58 ("damages awards under Section 1983 should be governed by the principle of compensation" as developed by the common law of torts, where common law does not provide full compensation, "the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.").

The City's newly adopted assertion at closing that project-specific injunctive relief is precluded because Plaintiff had a complete damages remedy available at law thus rings a bit hollow. The court granted a directed verdict for the City on the lost profits issue because Plaintiff – which consistently had sought a combination of money damages and injunctive relief, including project-specific injunctive relief, *see, e.g.*, Amended Complaint and Plaintiff's May 27, 2005 pretrial statement at 2 (seeking remedies including damages, declaratory relief, and "injunctive relief against the City and Valley with regard to the application of the SBE Program to the award of the drywall contract at issue") – failed in its case in chief to provide any evidence whatsoever with regard to the drywall project status or the potential availability of injunctive relief on any balance of the contract, at the close of Plaintiff's case, therefore, there was no factual basis on which assess available damage remedies or on which to instruct the jury to calculate any lost profits for drywall work already completed. *See, e.g.*, Ohio cases *supra* establishing precedence of injunctive relief as opposed to money damages in public bid contracts, *see also, e.g., Milwaukee Co. Pavers Assn. v. Fiedler* (W.D. Wisc. 1989), 707 F. Supp. 1016, 1032 (lawsuit

challenging "disadvantaged business" preference in construction contracts. "Plaintiffs would be entitled to money damages [for the alleged federal constitutional violations] *only if* their motion for a preliminary injunction were denied, they were to succeed ultimately on the merits of their claim, *and the state construction projects were to have proceeded so far that they could not reasonably be re-let under non-discriminatory bidding conditions,*" [emphasis added]). The court did not rule and does not find that Plaintiff had available a fully adequate remedy at law. It is true that no evidence as to the current status of the drywall work (and as to whether there remains any significant portion of that drywall project left for potential injunction) was presented until the City and Valley put forward proof on that subject as part of their defense cases; such evidence now is before the court, however, for any appropriate consideration.

In light of the equitable nature of the remedy sought, and especially given the public nature of the project at issue, the court also should consider whether the public interest would be served or harmed by an injunction and whether third parties would be unduly injured by such a remedy. "[C]aution should be exercised in granting injunctions, and especially so in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important public works or to control the action of another department of government." *White v. Long* (1st Dist. App. 1967), 12 Ohio App. 2d 136, 140, *see also, e.g., Leaseway Centers v. Dept. of Adm. Serv.* (10th Dist. App. 1988), 49 Ohio App. 3d 99, 106 (quoting *White), Cleveland Construction, Inc. v. Ohio Dep't. of Adm. Serv.* (10th Dist. App. 1997), 121 Ohio App. 3d 372, 383 (same).

Certainly there is a powerful public interest in requiring governmental entities to follow the law. Courts across this state have found that interest especially strong in the context of "protecting the integrity of the [public] bidding process." *Cf. Cementech,* 2005 WL 844948 (9th Dist. App.) (noting that where available, "the preferred method of resolving bidding disputes is injunctive relief, as that relief would prevent double payment [for the same project] and better serve the integrity of the bidding process"), *Hardrives Paving,* 99 Ohio App. 3d at 247-48 ("if injunction is the sole remedy, both the public and the bidder themselves are protected"), *Cedar Bay,* 50 Ohio St. 3d at 21 ("The intent of competitive bidding, under either the state statutes or a municipal charter, is 'to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms.").

Against such considerations the court weighs the potential harm to the public that could be caused by disruption of the ongoing Convention Center work. Defense witnesses testified that the Convention Center project as a whole is approximately sixty percent complete. The drywall work will be roughly 50 percent done by the end of July and is on a "critical path" in which delays could significantly affect other parts of the project. Defendants argue, in effect, that the savings that the City might obtain if it were ordered to shift the remaining drywall work from Valley to Cleveland at Cleveland's bid price are likely to be surpassed by additional costs arising from delay claims and lost Convention Center business. *See, e.g.,* McKillup testimony that potential delay claims could reach into the millions of dollars). Although

Defendants couple this argument with the contention that Cleveland delayed unduly in seeking to press its preliminary injunction claim, thereby allowing the project to reach a more delicate juncture, the court is constrained to note that the City seems to have contributed to any perceived need for extensive and lengthy discovery by taking positions such as its longstanding denial, only now abandoned, that it had not officially promulgated SBE Rules and Guidelines at all.

Valley is prepared to perform the balance of the drywall work and, with its subcontractors, would lose any expected remaining profits if the project is enjoined. Valley also presented testimony that a premature end to its contract would mean a loss of work for certain employees in light of the additional worker contingent recently added to the endeavor. Against that very real concern, the court notes that Valley would not have won the contract or been paid for *any* of the work had the contract been awarded in keeping with the $50,000.00 cost cap, and that Valley and its subcontractors appear to have been well compensated for the work they have performed relative to the significantly lower (and "otherwise qualified") bid submitted by Cleveland.

The court finds that equity would not be served by Cleveland's proposal that Valley be made to disgorge money it already has earned for work already done. Testimony at trial indicates that Valley followed the rules set forth by the City in bidding on the contract, and that it has borne substantial contractual risks associated with its undertaking. The court does not deem Valley's contract with the City void *ab initio*, and it would be inequitable to strip Valley of the

compensation it has been given for the work it has undertaken pursuant to contract.

Further, Cleveland provided no testimony whatsoever during its case in chief either with regard to the current status of the Convention Center project or with regard to Cleveland's own current ability to complete the work without delay and disruption to a major City undertaking. On rebuttal, Cleveland offered no testimony to dispute Defendants' position that the Convention Center drywall work is on a "critical path" that is extremely time-sensitive and as to which disruptions would impede other contractors and interfere with planned Convention Center events and broader City interests surrounding the City's economic development program. Cleveland did not offer credible assurances by a witness conversant with the scope of work and the project's current status that Cleveland could take over the job at this stage without undue and costly disruption. The court continues to believe that a Plaintiff in an action of this nature is not entitled to manufacture heightened claims to lost profits by eschewing serious efforts toward injunctive relief at any stage in the process.

Considering the testimony that was given, including the rebuttal testimony, the court finds that an injunction interfering with the ongoing Convention Center construction work has not been shown to be appropriate upon examination of all appropriate equitable considerations. The court reaches this conclusion reluctantly in light of the course that this litigation took, but it finds that the public interest is a weighty factor in this case involving a major public undertaking, *see, e.g., White,* 12 Ohio App. 2d 136, and that the public interest at this juncture is best served

by the combination of declaratory and non-project specific relief outlined above. The court further finds that Cleveland is the prevailing party on its Section 1983 due process claim and on its reasonable attorney's fee under 42 U.S.C. Section 1988. Costs will be assessed against Defendants jointly.

The court will ask the parties to confer, if they wish, on a judgment entry to propose to the court in very short order reflecting these determinations. The court also asks the parties to confer on a date for a hearing on the amount of Cleveland's attorney's fee.

/s/ Fred Nelson
Judge Nelson

APPENDIX L

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638
Judge Nelson

[Filed June 28, 2005]

Cleveland Construction, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, et al.,	)
	)
Defendants.	)
	)

Entry Granting Defendant City Of Cincinnati's Motion For Partial Directed Verdict, Denying Dismissal Of Equal Protection Claim, Withholding Judgment On Defendant Valley's 41(b)(2) Motion, And Noting Stipulation That Remaining Issues Are To Be Determined By The Court Without A Jury

For the reasons expressed on the record of today's date, the Court grants Defendant City's Motion For A Directed Verdict solely on the issues of lost profit and bid preparation cost.

The Court denies Defendant City's Motion for dismissal of Plaintiff's equal protection claim relating to the administration of the contract at issue in this case.

The Court defers a ruling on Defendant Valley's motion to dismiss under Rule 41(B)(2) and will withhold judgment on such issues until the close of all evidence.

All parties having stated that the remaining issues in this action are appropriate for determination by the Court alone without jury verdict, the jury is discharged with the consent of all parties with regard to all issues remaining in this action. The case will proceed as a trial to the bench with regard to Plaintiff's claims for declaratory and injunctive relief and attorney fees.

SO ORDERED.

/s/ Fred Nelson
Fred Nelson, Judge

APPENDIX M

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638
Judge Nelson

[Filed May 13, 2005]

Cleveland Construction,	)
	)
Plaintiff,	)
	)
vs.	)
	)
City of Cincinnati, et al.,	)
	)
Defendants.	)
	)

Entry Denying Defendants' Motions For Summary Judgment And Denying Plaintiff's Motion For Partial Summary Judgment And Injunctive Relief

Introduction

This matter comes before the court on the motion of Plaintiff Cleveland Construction, Inc. ("Cleveland") for partial summary judgment and for injunctive relief, and countervailing motions for summary judgment by Defendants the City of Cincinnati ("the City") and

Valley Interior Systems, Inc. ("Valley," which has associated itself with the City's legal position for purposes of its motion). The court in keeping with the requests of the parties conducted a nonevidentiary hearing on the motions, and has reviewed the arguments of counsel, the pleadings and briefs, and the evidence filed of record.

The case involves a dispute related to drywall work needed for the expansion and renovation of Cincinnati's Convention Center. The parties agree that in a second round of bidding to perform the drywall work, Cleveland offered to do the job for $8,889,000 and Valley submitted a bid of $10,135,022. Although Cleveland's bid was lower than Valley's by roughly one and a quarter million dollars, the City awarded the drywall contract to Valley as the lowest bidder that met the City's Small Business Enterprise program ("SBE") criteria. The City states that Valley got the contract because it was prepared to make greater use of small business subcontractors than could Cleveland.

Cleveland subsequently filed this lawsuit, alleging among other matters that the City's SBE program "is a sham to allow the City to use racial and gender-based quotas illegally," and asserting that in awarding the contract to Valley, the City violated Cleveland's equal protection rights and ignored its own municipal code in violation of due process. After a hearing at which this court denied Cleveland's motion for a temporary restraining order, Defendants removed the case to federal court; in due course, the action was remanded here, the court dismissed certain individual defendants, and the parties engaged in extended discovery. Cleveland elected not to pursue application for a preliminary injunction until the filing of the

instant motions, which include the summary judgment issues to which the court now turns.

Summary Judgment Standard

Summary judgment is appropriate when it is clear from the facts established in the pleadings and evidential materials of record, as viewed in the light most favorable to the party or parties opposing the motion, that: "(1) no genuine issue of fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." *See, e.g., Sauter v. One Lytle Place* (1st Dist. App. 2005), 2005-Ohio-1183, citing Civil Rule 56(C). If a party seeking summary judgment meets its initial burden of identifying a basis for the motion together with those parts of the record that "demonstrate the absence of a genuine issue of material fact on the essential element(s) of the ... nonmoving party's claims ...., the nonmoving party then has a reciprocal burden ... to set forth specific facts showing that there is a genuine issue for trial ...." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

Equal Protection Issues

At this stage in the litigation, Cleveland argues that the City's SBE program as designed (to include certain "Rules and Guidelines") and as applied here amounts to a race-conscious awards scheme that the City cannot justify under prevailing constitutional norms. (Plaintiff at this point does not argue that the City has required improper considerations of gender, perhaps because Valley's successful bid did not reflect

subcontracting percentages for women-owned firms that approached the City's availability estimates.) The City is frank to respond that it lacks a factual predicate that could satisfy "strict scrutiny" review of a race-conscious program, but argues that its SBE approach as designed and as undertaken here is race-neutral, rationally based, and constitutionally unexceptionable. The record as presented to date reflects genuine issues of material fact that preclude summary judgment for any side on this part of the dispute.

The City's municipal code provides that "Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ... services ...." Cincinnati Municipal Code ("Code") at 323-7(a). The Code defines a Small Business Enterprise with regard to gross revenues and number of employees; the SBE definition itself does not include factors of race or gender. Code 323-1-S. The record here may suggest that the City pursues the 30% SBE goal on a project by project basis, establishing different percentages for different project components in order to arrive at the overall 30% figure. The parties agree that with regard to the drywall element of the Convention Center project, the goal was that 35% of subcontracting dollars go to SBEs. *See also, e.g.*, Small depo. at Ex. 5 (City's "Subcontracting Outreach Program Summary" sets Drywall "Goal[ ] For Bid Package C" at 35%).

Standing alone, that SBE goal does not on its face implicate any considerations of race or gender, and the court does not understand Plaintiff to argue that a program undertaken to ensure participation of small businesses is subject to heightened scrutiny simply

because it may have the ancillary effect of broadening participation for people in groups as defined by race or gender. Plaintiff argues, however, that the program must be assessed in light of 'Minority Business Enterprise/Women's Business Enterprise' "participation goals of 30% [for] construction ... services [,to be] monitored, tracked internally, and reported annually to city council along with annual SBE participation rates," as also established in Code 323-7(a), and in light both of "availability estimates" provided by the City to reflect percentages of minority and female controlled subcontractors available for hire in the region, and of SBE "Rules and Guidelines" that imply or direct a race-conscious focus for the program. The City responds that this project, by its terms, involved only SBE goals; that availability estimates, in and of themselves, do not establish any particular hiring requirements; and that the Rules and Guidelines never were officially promulgated and have not been applied, at least in full, to this project.

It is undisputed that in the course of the bidding process, the City was asked why it had provided prospective bidders with an "Availability Estimation Sheet ... Subcontractor Outreach Program (CMC 323-31) noting availability estimates for drywall subcontractors of "13.09% Minority" and "1.05% Female." *See* Amended Complaint at Ex. B and City's MSJ at page 8. The inquiry, disseminated along with the answer to all prospective bidders, continued: "I thought this project only deals with SBEs. Please clarify." The City responded: "This project does deal with SBEs. However, the City of Cincinnati's Disparity Study found that Minorities and Females were underutilized in city contracting projects. .... The minority and female business owner would also have

to be certified with the City as a Small Business Enterprise. If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However, we expect the utilization of SBEs to be reflective of the availability estimates." Amended Complaint at Ex. H; City's MSJ at 8.

The City submits that this arguably rather opaque answer demonstrates that the drywall bids were governed exclusively by SBE considerations without regard to MBE/WBE concerns. The City points, also, to evidence indicating that a first round of bidding resulted in no contract award because Valley, while exceeding the MBE availability estimate, did not satisfy the 35% SBE goal. The City further notes testimony of its representatives to the effect that availability estimates did not factor into its bid evaluation, and argues that a stated desire to calculate and track project participation by race does not itself trigger strict scrutiny under such precedent as *Reed v. Agilent Technologies*, 174 F. Supp. 176 (D. Del. 2001). The City, in short, cites to testimony of its representatives that Cleveland was disqualified because it did not meet the 35% SBE goal, and that considerations of race simply did not enter into the determination. *See, e.g.*, purchasing agent Franklin depo. at 46; Ranford at 68 ("when I looked at a bid I did not look at the availability estimation, all I was concerned about was Small Business Enterprise").

Cleveland contends that the City's answer on the relevance of availability estimates should not be construed as advising bidders that the City will not consider race or gender in evaluating bids. Moreover, Cleveland points to Valley's certification of MBE percentages in its winning Subcontractor Utilization

Plan, to language in the required Statement of Good Faith Efforts (form 2007, certifying use of any "methods to obtain the maximum practicable participation by small, minority and women-owned business enterprises"), and to language in the Subcontracting Program Outreach Summary stating that "[b]idders should be able to include minority and female firms at the level of availability indicated." *See, e.g.*, Strawser depo. ex. 3; Small depo. ex. 5.

Moreover, Cleveland emphasizes a document titled: "City of Cincinnati/Small Business Division/Office of Contract Compliance/Small Business Enterprise Program/Rules and Guidelines." *See* Townsend depo. ex. 19. That document recites, among other things, that "[i]f ... evaluation determines that a bidder has failed to achieve levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall be subject to an inquiry by the Office of Contract Compliance." Furthermore, the document states, that Office is to examine bid forms to determine "the amount of the subcontracts awarded to minority and women-owned businesses .... If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for

a discrimination investigation." Townsend depo. ex. 19 at 6, 45-46.

For the purposes of these motions, the City does not really argue that such provisions in the "Rules and Guidelines" document are permissible as mechanisms to prevent intentional discrimination by contractors. Rather, the City contends that "[t]he Rules and Guidelines ... were never signed by the City Manager and do not have the force of law," and that "certain portions of the 'Rules and Guidelines' have not been used" in the bid solicitation and evaluation process. *See* City's memo opposing Plaintiff's MSJ at 13; *see also* Lemmie depo; Ranford depo. at 68, 70-73 (City engaged in no evaluation of MBE participation).

Code section 323-31 instructs the City Manager to promulgate rules and regulations for the SBE Subcontracting Outreach Program; the City Manager, however, has testified that, "I have not promulgated rules and regulations under this section." Lemmie depo. at 10. The City also notes that there is no evidence in the record that the Rules and Guidelines document was made available or known to any bidder prior to the award of the contract at issue; that is, the current record does not reflect that the document directly could have caused any bidder to take race into account in submitting a proposal. The City in effect disavows any problematic portions of the document by arguing that those sections never have controlled the policy of the City or its contractors. On the state of the record to date, that appears to be a genuine issue of material fact (although the court does observe that the City has admitted that the Rules and Guidelines "are ... part of the Small Business Enterprise Program," *see* City's Response to Interrogatory 17(D) at 6).

Viewing the evidence in the light most favorable to the non-moving party, and given that the Rules and Guidelines document was prepared for and available to City staff, and served to some extent as "working documents used by staff," Lemmie depo. at 11 and Stark depo. ex. 6, (and considering, too, presumptions of regularity that generally inform review of governmental actions), the court cannot conclude for summary judgment purposes that the principles embodied in the Rules and Guideline document played no part in the determinations at issue here. By the same standard, with all reasonable inferences drawn in favor of the Defendants in evaluating Cleveland's summary judgment motion, the court cannot find as a matter of undisputed fact that certain sections of the Rules and Guidelines cited above entered into the City's decision. The status of the "Rules and Guidelines," and the issue of to what extent and effect, if any, they were used here or may support other reasonable inferences regarding Cleveland's claim that the SBE program is run as a "sham" to mask a race-conscious awards program, remain questions of arguably material fact.

In light of the City's response to the bidder inquiry about the relevance of availability estimates, viewed in conjunction with the bid documents and Code mandates and the Rules and Guidelines document, and the testimony of City officials, the court similarly concludes under the summary judgment standard that a question of fact remains as to whether the City did intelligibly and accurately communicate to the bidders that this drywall project was to be administered under SBE principles without regard to considerations of race (as Defendants maintain was the case and which Plaintiff strongly disputes). Moreover, the court notes

as an aside that the record indicates arguably conflicting testimony regarding the subjective impressions of the bidders on this score.

In short, whether or not the City has engaged here in a race-conscious contracting program of the sort that would require "strict scrutiny" review depends on a determination of facts that remain at issue when reasonable inferences are drawn in favor of the non-moving parties on each of the summary judgment motions. *Cf. Safeco Ins. v. City of White House, Tenn.* (6th Cir. 1999), 191 F.3d 675, 692 ("Outreach efforts may or may not require strict scrutiny" [citing authority that such heightened review "'is generally inapplicable' to outreach efforts that target one race], "But ... where their administration 'indisputably pressures' contractors to hire minority subcontractors [,] courts must apply strict scrutiny").

The City argues, however, that Cleveland lacks standing to pursue its equal protection claims in any event because it did not meet the 35% SBE standard and therefore could not have been awarded the contract regardless of any other considerations. *Cf. Florida General Contractors v. Jacksonville* (1993), 508 U.S. 656 (traceability requirement). The court finds below however, that the City's Code in some instances precludes award of a contract based primarily on SBE Subcontractor Outreach Program considerations where the winning bid is more than $50,000 higher than the bid of an otherwise qualified contractor rejected for not meeting the SBE goal. Under these circumstances, where the City agreed to pay well more than one million dollars extra in order to achieve 35% participation by small businesses in the drywall project, the undisputed facts do not establish for

summary judgment purposes that Cleveland would have been out of the running for the award had the City applied its SBE rules in the context of the Code as written. Thus, Defendants' standing argument fails at this point in the process for reasons even beyond Cleveland's contention that the SBE program itself is wholly a sham to mask impermissible race-conscious awards.

The court therefore denies the motions for summary judgment of all three parties with regard to Cleveland's equal protection claims.

Due Process Issues

Defendants concede that Cleveland's bid to perform the drywall work on the City's Convention Center project was $1,246,022.00 lower than Valley's. City's MSJ Memo at 7 ("Valley's bid was for $10,135,022.00 while Cleveland's bid totaled $8,889,000.00"); Valley's MSJ (adopting "all the same grounds" as City). Defendants also affirm that "Cleveland's bid was excluded from consideration because it failed to meet the SBE requirements," City's MSJ Memo at 7, and they point to no other infirmities in Cleveland's bid or capacity to perform the work. *Cf.* Franklin depo. at 21-22, 29, 62, 88 (City purchasing agent believes that all three bidders met non-SBE bid specifications and that those bids were acceptable to the purchasing department; no issues with Cleveland's prior performance).

Code section 321-37, "Bid; Award to Lowest and Best" provides in part:

"(a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder. ...

(c) Factors to be Considered: Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, but are not limited to: [prior performance; prevailing wage history; compliance with nondiscrimination rules; and]

(4) Information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued by the city manager pursuant to ... section 323-31.

In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."

(emphasis added)

Cleveland contends that in awarding the contract to Valley despite the fact that Valley's bid was more than $50,000 higher than Cleveland's (by more than 1.2 million dollars), the City abused its discretion and thereby deprived Cleveland of a constitutionally protected property interest without due process of law. Defendants argue that Cleveland was not the lowest and best bidder because it failed to reach the SBE goal without regard to Subcontracting Outreach Program rules. *See* City's memo in op. at 22; Valley's memo in op. at 10 ("Code section 321-37 does not apply ...

because Cleveland was not an otherwise qualified bidder eligible for consideration under 321-37").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation; rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v. Ohio Department of Administrative Services* (10th Dist. 1997), 121 Ohio App. 3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of ... officials as to whom the contract should be awarded" and that discretion was abused in depriving the bidder of the award. *Id.* at 394-95 (no abuse of discretion found); *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co. Commissioners* (6th Cir. 1996), 85 F.3d 257, 260 ("A constitutionally protected property interest in a publicly bid contract can be demonstrated .... [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract'; no abuse of discretion found); *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6th Cir. 1989), 890 F.2d 416 ("if the board had limited discretion under local roles as to whom should be awarded the contract ..., then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate;" no property interest where state guidelines were nonexhaustive); *cf. United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992), 960 F.2d 31, 34 ("Michigan ... law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"); *Cementech, Inc. v. City of Fairlawn* (Ohio 9th Dist. App.), 2005 WL

844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete); *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2nd Dist. App.), 1996 WL 303591 ("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"); *Miami Valley Contractors, Inc. v. Oak Hill* (4th Dist. App. 1996), 108 Ohio App. 3d 745, 752 (no abuse of discretion found; "we can find no support for the proposition that a second- or third-place finisher in a lowest and best bidder determination acquires a constitutionally protected property right").

"'The meaning of the term 'abuse of discretion' ... connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude' .... 'Arbitrary' means 'without adequate determining principle; *** not governed by any fixed rules or standard.' .... 'Unreasonable' means 'irrational'." *Cedar Bay Construction, Inc. v. City of Fremont et al.*, 50 Ohio St.3d 19, 22, citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the 'lowest and best bidder.' .... [I]n the absence of evidence to the contrary, public officers [and] administrative officers ..., within the limits of the jurisdiction conferred by law, will be presumed ... not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "'is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion'." *Id.* at 21 (citation omitted). *See also, e.g., Greater*

Cincinnati Plumbing Contractors' Association v. City of Blue Ash (1st Dist. 1995), 106 Ohio App. 3d 608, 613-14 (a Charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C. 735.05]; "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

If the bid in the instant case was awarded in violation of the explicit $50,000/10% cap established by 321-37(c)(4), the award would be an abuse of discretion and Cleveland would have a "legitimate claim of entitlement" sufficiently clear to give rise to a due process claim. Violation of that precise standard as established by ordinance would move Cleveland's interest in the contract beyond the "mere 'unilateral expectation'" of receiving the award under a regime in which the relevant ordinance provides non-exhaustive guidelines limiting discretion, *cf. Peterson Enterprise,* 890 F.2d 416; *Cleveland Construction,* 121 Ohio App.3d at 394, and into that rare context in which a disappointed bidder may assert a constitutionally protected property interest. This is the basis on which Cleveland advances the second part of its motion for partial summary judgment. *See* Motion at 2 (seeking judgment based on an asserted "property interest in the contract"). Under the summary judgment standard, the court thus turns to the question of whether any genuine issue of material fact exists as to whether the City breached its 321-37(e)(4) cap.

The language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and

regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is selected "based primarily" on that factor, the City may proceed to award the contract "subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower." 321-37(c)(4).

In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor." The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis.

Cleveland points to legislative history for 321-37 indicating that the City Administration took the position and advised Cincinnati's City Council that the ten-percent/$50,000.00 cap would apply to any purchasing contract affected by SBE compliance issues. Assistant City Manager Rashid Young advised Council's Law and Public Safety Committee on November 25, 2003 that "[w]hat this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant [bidder] if they are not the lowest. This ordinance would allow us to award a bid if the bid is $50,000 or less difference away from the lowest bid. .... We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid and ... it didn't make a lot of sense to spend nine hundred thousand dollars

more to comply with the regulations of SBE." Young depo. and ex. 1.

By its terms, however, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with *'SBE Subcontractor Outreach Program rules'* ... issued ... pursuant to 323-31." Code 321-37(c)(4) (emphasis added). As used in the legislative text, the reference to an "SBE Subcontractor Outreach program" does not appear coextensive with the broader "Small Business Enterprise Program" itself. Thus, for example: Chapter 323 as a whole is titled "Small Business Enterprise Program," while section 323-31 specifically is titled "Subcontracting Outreach Program;" and Section 323-5 directs the City Manager to "issue and enforce regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter," while Section 323-31 directs the City Manager to "issue and enforce rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program, substantially in conformance with the content of Part II, Section I, the 'Legislative Recommendation Report To The City of Cincinnati' dated December 17, 2002, prepared by Griffin & Strong, P,C.."

As Cleveland observes: "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' ... No part [of a statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health*

(2002), 96 Ohio St.3d 250-256 (citations omitted); *see also* Cleveland's MSJ Motion/Memo at 39. Council enacted 323-31 directing enforcement of regulations for the "SBE Subcontracting Outreach Program" in 2003, while leaving in place the separate 323-5 directive as enacted in 1999 to enforce regulations for the SBE program itself. If the Subcontracting Outreach Program and the overall SBE program were identical, a double instruction on enforcement would be unnecessary and redundant. The specific reference in 321-37(c)(4) to the SBE Subcontracting Outreach Program thus appears to comprehend something less than the SBE program as a whole (a conclusion strengthened by the structure of Chapter 323).

The distinction between the "SBE Subcontractor Outreach Program" and the overall SBE program may not be terribly complex. The Griffin & Strong Report referenced and to some extent incorporated by Code section 323-31 ("Subcontracting Outreach Program") itself makes clear that "[t]he Subcontracting Outreach Program applies to City-funded construction contracts of $100,000 or more," except where the City "in advance" specifically waives such requirements. Lemmie Depo. Ex. 2 (December 17, 2002 Griffin & Strong Report at 3, 5). That is also the deposition testimony offered by City representatives. *See, e.g.*, Ranford depo, at 78 ("Those are for contracts that are in excess of $100,000"). That distinction, applying the Subcontracting Outreach Program to contracts in excess of $100,000, both would explain the implication in the Code that the SBE Subcontracting Outreach Program is only a subset of the SBE program overall, and could vindicate the City Administration's representation to Council through Mr. Young that 323-31 would preclude the City from paying, for example,

"nine hundred thousand dollars more to comply with the regulations of SBE": it gives a widely applicable meaning to the $50,000/10% cap, while also making clear that the cap applies only to relatively large contracts.

The record before the court further reflects that at least some elements of the SBE Subcontractor Outreach Program were applied to the bids at issue. As City contract compliance officer Ranford has testified: "The Subcontracting Outreach Program was applied to convention center bids. If you have any of those bid documents, you will see the Subcontracting Outreach Program. Those are for contracts that are in excess of $100,000." Ranford depo. at 78; *see also id.* at 60 ("we had the Subcontracting Outreach Program on all convention center projects and they were in excess of $100,000. So we followed how that worked, the goals. The goals were set."), 83 ("The Subcontracting Outreach Program was used for convention center"), 100 ("Q: "There's a listing of the forms that you reviewed ... for the bidders in this case? A: These were the same documents that were the Subcontracting Outreach Program, yes.").

The record now before the court also reflects that the very bid requirement document that specified the 35% SBE participation figure was headed in all capital letters: "SUBCONTRACTING OUTREACH PROGRAM SUMMARY/CONVENTION CENTER PROJECT." *See, e.g.*, Small depo. ex. 5; Butler depo. ex. 1, tab 4, p.7. That document continued, in part: "SBE GOALS PER TRADE CONTRACT ..., BID PACKAGE C: All bidders are required to meet the goal stated .... Drywall .... 35%." The Outreach Program Summary also stated that the "SBE bidder must

clearly indicate on Form 2003 the percentage of work that represents their SBE participation percentage as a Prime related to the completion of the scope of work."

Substantial evidence in the record suggests, too, that the City treated that 35% figure as a mandatory requirement. *See, e.g,* Townsend depo. at 83 ("You're determined not to be in compliance if you did not meet the goal, yes"), 106. Indeed, the City bases its Motion with respect to Cleveland's equal protection claims on the assertion that the SBE goal was mandatory, although Cleveland takes somewhat of a contrary position, *cf.* Cleveland's Reply Memo in support of MSJ at 2, citing prior Townsend testimony. Whereas the rest of the Code relating to SBE matters speaks in terms of "goals" not expressed as inflexible threshold requirements, the Subcontracting Outreach Program as referenced in 321-37 and 323-31 "requires bidders to ... achieve a minimum of 20% (which may [be] higher for construction of buildings) SBE subcontractor participation." December 17, 2002 Griffin & Strong Report 7 (noting elsewhere that City can waive requirement in advance under the program). Significantly, at the same time that the Code was amended to include the Subcontracting Outreach Program language (including the cost cap), Council also deleted Code language otherwise requiring bidders to submit (less rigorous) "written assurance of commercially useful SBE participation in their bids" and to make "good faith" efforts to meet SBE participation levels. *See* former Code sections 323-27 and 323-29, as repealed by the same ordinance that established 232-31 incorporating the more mandatory regime of the Griffin & Strong report.

That mandatory approach also is largely consistent with the "Subcontracting Outreach Program" section of the Small Business Enterprise Program Rules and Guidelines that, although not signed by the City Manager, nonetheless provided guidance to City employees in certain respects. *See, e.g.*, Townsend depo. ex. 19 ("Rules and Guidelines") at 9 ("Subcontracting Outreach Program, CMC 323-31: The Subcontracting Outreach Program applies to City-funded construction contracts of $100,000 or more. At the City's sole discretion, these requirements may be waived in advance .... The Subcontracting Outreach Program requires bidders to ... achieve a minimum of 20% [which may be higher for construction of buildings] SBE subcontractor participation. To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to ... SBE subcontractors"); *see also* Lemmie depo. at 11 ("Rules and Guidelines" were "working documents used by staff in the office"); Ranford depo. at 78, 80 and ex. 34 and G ("Rules and Guidelines" page 10, Subcontracting Outreach Program with regard to coverage of projects over $100,000 and mandatory nature of SBE figures was used for contract compliance review in convention center program, whereas Nondiscrimination MBE sections of Rules and Guidelines were not). The court observes, however, that Cleveland's position that "the City has ... decided that good faith efforts [to achieve SBE compliance] do not matter and does not look at them," Cleveland's MSJ Memo at 33, argues that certain elements of the Subcontracting Outreach section of the Rules and Guidelines were disregarded in pursuit of higher SBE figures, *see* Ranford depo. ex. G at 11 (good faith exceptions).

The City Manager's failure formally to promulgate rules and regulations for the Subcontracting Outreach Program under 323-37, of course, can provide no justification for any failure to abide by the $50,000/10% cost cap established by 321-37. Code 323-31 *requires* the issuance of such rules: "The City Manager *shall issue* roles and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program...." Failure to provide required regulations may compound an abuse of discretion; it does not mitigate such an abuse. *See, e.g., City of Dayton, ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 360 (1981) ("The presence of standards against which such discretion may be tested is essential; otherwise, the term 'abuse of discretion' would be meaningless"); *cf.* Lemmie depo. at 11 ("[a]t this time we have no plans" to issue any SBE rules and regulations other than those cited above as "working documents used by staff.").

Similarly, the City's perhaps unusual approach to legislative drafting – codifying the Subcontractor Outreach Program through statutory references to a consultant's report, rather than by direct recitation of standards and requirements – cannot permit the City to ignore the cost cap that Council did specifically enact in 321-37. Had the legislative recommendations concerning the Subcontractor Outreach Program as set forth in Part II, Section I of the Griffin & Strong report referenced in 323-31 been adopted in a more straightforward fashion, the connection between the Subcontractor Outreach Program and a generally required SBE figure of 20% or higher would be more publicly visible. That connection is not nullified simply because it may be obscured by the indirect approach of the Code.

Code section 321-37(c)(4) envisions that "[i]nformation concerning compliance" with the SBE Subcontracting Outreach Program may be the primary basis for the selection of the lowest and best bidder (in which event, the cost cap applies). Defendants do not dispute that award of the contract to Valley was "based primarily" on "compliance" with the 35% SBE figure set forth in the SUBCONTRACTING OUTREACH PROGRAM SUMMARY. *See, e.g.*, Franklin depo. at 28-29 ("Q: ... do you remember any factor other than SBE compliance that was a primary factor in deciding who got the bid award in this situation? A: No. ....Q: ... do you recall there being any factor that made a difference primarily one way or the other other than the SBE number? A: No."). Although the title of that bid requirements document may not be dispositive, it does not appear to weigh in Defendants' favor.

Defendants plainly have not established that they are entitled to summary judgment on Cleveland's due process claim or on the remaining elements of Cleveland's Amended Complaint.

The closer issue is whether Cleveland is entitled to judgment on the due process portion of its motion. When the evidence is reviewed in the light most favorable to Defendants, as the summary judgment standard requires for this evaluation, the court cannot find that reasonable minds could come only to the conclusion that Cleveland had been divested of a property right in violation of due process of law. A question remains for the finder of fact as to whether the City legitimately designated Valley as the lowest and best bidder based on factors other than information concerning compliance with the

Subcontracting Outreach Program. That is, an arguable question of fact remains as to whether the 35% SBE figure invoked by the City derived from the Subcontracting Outreach Program itself (with its generally mandatory 20% SBE threshold) or from efforts by the City on top of the Subcontractor Outreach Program to approach the overall 30% SBE goal contained elsewhere in the Code.

The City's 30% SBE goal was created prior to the Subcontractor Outreach Program and continues in effect today in a Code section separate from that containing the Subcontractor Outreach Program. Code 323-7 ("The city of Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ..."). The parties have not specifically identified in their briefing the particular genesis of the 35% drywall SBE figure that was used for Convention Center bids, and the court does not find the facts on that matter established beyond peradventure. That the Subcontracting Outreach Program applies to contracts over $100,000 and generally requires at least 20% SBE participation need not necessarily mean to a finder of fact that the higher goal of 30% SBE participation stated elsewhere in the Code could not have provided a sufficiently distinct basis for the City's evaluation.

The facts do make clear that the City insisted upon a re-bid after the initial bidding round in which Valley came very close to but did not meet the 35% figure (while very considerably exceeding the 20% level designated by the Subcontracting Outreach Program); in the end, Valley achieved 40% SBE participation to Cleveland's 10% -- a difference of 400%. The record also includes testimony that the Convention Center

project is the only recent City project for which SBE goals were set at higher than the 20% Subcontractor Outreach figure. *See* Ranford depo. at 84.

The City has broad discretion to determine what constitutes the lowest and best bid. *See* 321-37; 321-65 (award to the "most advantageous" offeror, "taking into consideration price and evaluation factors set forth in the request for proposals"; here the contract was awarded on "lowest and best" basis); *cf. Cedar Bay Construction,* 50 Ohio St.3d at 21. Construing all the facts in the light most favorable to the Defendants for summary judgment purposes, the court determines that a reasonable finder of fact could decide that the cost cap provision is not triggered because the City arrived at its award for reasons substantially enough beyond the Subcontracting Outreach Program as to make "information concerning compliance" with that program something less than the primary basis for the award. That is an issue for trial next month.

The court therefore denies all motions for summary judgment in this matter.

Cleveland's Motion for Injunctive Relief

The court at this time will deny Cleveland's motion for injunctive relief pending trial. The parties' desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the

dispositive motion period -- almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date – to pursue its preliminary injunction request.

Moreover, Cleveland has provided no evidence whatsoever to meet its burden of proving (by clear and convincing evidence) various elements required to win injunctive relief. For example, the court has been presented with no evidence, apart from the McKillip affidavit provided by the City, as to the current status of the Convention Center drywall project, the equitable balance of harms among the parties, and important factors affecting the public interest. The trial date now is not much more than one month away; the evidence adduced there surely will help inform any decisions with regard to injunctive relief. The court in the exercise of its equitable powers will await that necessary information as presented by the parties in an orderly manner at trial.

SO ORDERED

/s/ Fred Nelson
Fred Nelson,
Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202 (fax: 381-9206)

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202 (fax: 852-8222)

APPENDIX N

THE SUPREME COURT OF OHIO

Case No. 2010-1019

[Filed September 29, 2010]

Cleveland Construction, Inc.	)
	)
v.	)
	)
City of Cincinnati and Timothy Riorden et al.	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C090419)

/s/ Eric Brown
ERIC BROWN
Chief Justice